Tagore Law Lectures.—1887.

THE LAW

OF

TESTAMENTARY DEVISE AS ADMINISTERED IN INDIA.

OR

THE LAW RELATING TO WILLS IN INDIA

WITH AN APPENDIX

CONTAINING

THE INDIAN SUCCESSION ACT (X OF 1865), THE HINDU WILLS ACT (XXI OF 1870), THE PROBATE AND ADMINISTRATION ACT, 1881 (V OF 1881), WITH ALL AMENDMENTS, THE PROBATE AND ADMINISTRATION ACT, 1889 (VI OF 1889) AND THE CERTIFICATE SUCCESSION ACT (VII OF 1889).

BY

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PREFACE.

THE following twelve Lectures are the Tagore Lectures for 1887. In consequence of my having to be absent in England for some time last year they have been somewhat delayed in publication. I have, however, taken advantage of the delay to incorporate the important alterations made in the law by Acts VI and VII of 1889, and also a number of cases decided since the Lectures were delivered in the hope that this may materially add to the usefulness of the book. In other respects the Lectures are published as they were actually delivered. The references to "Intestate and Testamentary Succession in India" are to a book published by me under that title in 1882.

G. S. H.

Calcutta, July, 1889.

ADDENDA AND CORIGENDA.

Page 35 line 3 *for* "Burmeese" *read* "Burmese."
—— 85 ,, 6 *for* "by" *read* "to."
—— 96 ,, 5 *delete* comma *after* "seeing."
—— 97 note (4) add *Horendranarain Acharji*, v. *Chandrakanta Lahiri*, I. L. R. 16 Cal. 19.
—— 100 ,, (3) *for* "Ccesswell" *read* "Cresswell."
—— 107 line 25 *for* "6" (reference to footnote) *read* "4."
—— 119 ,, 31 *for* "23" *read* "7."
—— 158 note (3) *delete* "*Supra p.*"
—— 201 ,, (7) 2nd line *for* "Aet" *read* "Act."
—— 210 line 28 *for* "90" *read* "98."
—— 214 ,, 16 *for* "Wills Act" *read* "Hindu Wills Act."
—— 307 note (5) *for* "*Sasi*" *read* "*Dasi*,"
—— 338 note (1) *for* Act XXXIV of 1838 *read* "Act XXXIV of 1858."
—— 370 ,, (3) *after* note, *add*, "See Act VI of 1889, s. 19."
—— 372 ,, (7) *for* "Indian Succession Act s. 275" *read* "Indian Succession Act, s. 276; Act V of 1881, s. 97."
—— 374 ,, (8) *for* "s. 275" *read* "s. 278."
—— 382 ,, (11) *for* "A4t V" *read* "Act V."

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THE LAW

TESTAMENTARY DEVISE AS ADMINISTERED IN INDIA.

LECTURE I.

INTRODUCTORY.

Early history of wills—Roman wills—Testamentary Succession in England—Laws as to wills in India—Mahomedan Law—Practice of making wills among Hindus—Validity of wills, when established in Bengal—in Bombay—in Madras—in N. W. Provinces—in Punjab and Oudh—Wills of Burmans—Regulations affecting wills in Bengal—In Madras—in Bombay—Act XXV of 1838—Indian Succession Act, 1865—Wills of Sikhs, Jains, Cutch Memons and Buddhists—Applicability of Indian Succession Act—Native Christians—Hindu Wills Act, 1870—Probate and Administration Act, 1881—Classes of wills in India—Wills of Hindus to whom Hindu Wills Act does not apply—Wills in favour of females.

Among European nations the institution by which a man is allowed to regulate the deposition of his property after his death is of great antiquity. Research, however, into the early history of society and law in Europe seems to show that such an institution is not to be found in the more primitive stages of society but is the outcome of a more or less developed social state. It has been affirmed as a general proposition by Sir Henry Maine in his Ancient Law[1] that in all indigenous societies a condition of jurisprudence in which testamentary privileges are not allowed, or rather not contemplated, has preceded the later stage of legal development in which the mere will of the proprietor is permitted with more or less restriction to override the claims of his kindred in blood.

Reference to wills or testaments is to be found in Roman history long before the celebrated Code, known as the Twelve Tables, was promulgated, about 450 years before the Christian era, by the Decemvirs. But it seems to be admitted by those who have made a study of the history of early institutions, that the tribes which settled on the outskirts of the Roman Empire had not yet, when they first came in contact with the Romans, acquired the idea of testamentary deposition. As pointed out by Sir Henry Maine, there is no trace of any such conception as that of a will to be found in those parts of their written Codes which

[1] Ancient Law, p. 177.

comprise the customs practised by them in their original seats and in their subsequent settlements on the edge of the Roman Empire.[1]

In time the Barbarians, as might be expected, began to follow the example of the more highly civilized people with whom they mixed. The conception of testamentary power once acquired, appears to have spread rapidly throughout Europe, notwithstanding the fall of the Empire, its spread and general adoption being most materially assisted by the influence of the Church. Modern European wills, therefore, trace their origin to the ancient Roman testament. The English law of testamentary succession in regard to personal property is only a modified form of the institution by which in its later developement the devolution of property was regulated among the Roman citizens.

Among the Romans themselves the law relating to wills passed through many phases. Possibly in its earliest form, a will was merely a mode of declaring who should have the chieftainship, or the management in succession to the testator. The early history of Roman jurisprudence shows that in ancient times wills were proclaimed or recited in the *Comitia Curiata*, or the General Assembly of the Patricians, which was convened (*calata*) twice a year for the purpose. In time of war, wills were similarly proclaimed before the assembled army in martial array, or *in procinctu*. Wills made before the *Comitia Curiata* were therefore in the nature of private laws directing in each case an interference with what would have been the ordinary devolution of property by descent. It is possible that a will *in procinctu* was considered also to have a sort of legislative sanction, as being the act of the people convened together, but in military array. There was necessarily no secrecy attaching to wills made either before the *Comitia Curiata* or *in procinctu*, and it is probable that, in earlier times at least, such wills were not ordinarily reduced to writing.

In later times another form of will was introduced. It appears to have had its origin among the Plebeians who were not admitted to the Patrician Assembly. This form of will was in effect a complete conveyance of the effects of the testator to the persons whom he meant to be his heirs or successors. It was an imaginary sale (or mancipation) in the presence of five witnesses before a person who attended with a pair of scales and who was called the *libripens*. It was designated *testamentum per æs et libram*. Originally the vendee of the testator's estate, or *familiae emptor*, as he was called, was the heir or successor of the testator.[2] The transfer was irrevocable, and the presence of the *familiae emptor* being necessary, the intended deposition by this form of testament also was in no way secret. In time the *familiae emptor* ceased to be the person beneficially interested. He still, however, continued to be a necessary party to the proceedings in imitation of the more ancient form, but his duty

[1] Ancient Law, p. 172.

[2] Gaius II, § 103.

now was, like that of an executor under Enlglish law, to distribute the estate according to the testator's wishes. Afterwards, in order apparently to secure secrecy, the wishes of the testator were committed to writing and the fictitious sale became a mere form for the purpose of giving effect to the directions contained in the writing.

The will *per æs et libram* is known also as the Plebeian will, and at first questions seem to have been raised as to whether a Plebeian will could be binding without the sanction of the *Comitia Curiata*, but all such questions were set at rest by the legislation of the Decemvirs. Their Twelve Tables to which reference has already been made, expressly recognised the general power of disposing of property by will, declaring the law in the following terms: "*Pater familias uti de pecuniâ tutelâque rei suæ legassit ita jus esto*"—"the directions of the testator as to his property and the guardianship of his children shall be carried into effect."

By the law laid down in the Twelve Tables the powers of a testator in disposing of his property were practically unlimited, but these powers were gradually circumscribed by different laws having for their object the protection of those who had a natural claim upon the testator.

In the Roman law the essence of a testament was the institution of the heir, or *haeres*, on whom devolved the *persona*, or the rights and duties of the testator, the theory being that the testator had, as it were, a posthumous legal existence in the person of his heir. If no heir was appointed, the intended dispositions could not take place, as the legal existence of the testator was not continued. If a father wished to disinherit his children or those who had a natural claim to the inheritance, he had to do so expressly, otherwise the will was void.

According to Sir Henry Maine, who refers to it as a remarkable circumstance, a will was never regarded by the Romans as a means of disinheriting a family or of effecting the unequal distribution of a patrimony, and the rules of law preventing its being turned to such a purpose increase in number and stringency as the jurisprudence unfolds itself.[1] Of the various provisions for the protection of the natural heir, the most important was the *lex Falcidia* passed in the year 40 B. C. in the reign of Augustus. By that law no one was allowed to give in legacies more than three-fourths of his goods, after making deductions for debts and funeral expenses, so that at least one-fourth was secured to the natural heir.[2] This fourth part was known as the *Falcidia* or *portio legitima*. For a long time it had been allowed to parents, children and brothers who had been disinherited by name to prefer a complaint called the *querela inofficiosi testamenti*. It was an answer to such a complaint that a certain portion, afterwards

[1] Ancient Law, 217.

[2] Gaius II, § 227.

fixed at a fourth by the *Lex Falcidia*) had been left by the testator to the claimant. Justinian abolished the *querela inofficioci testamenti* if any portion of the inheritance had been left to those who were entitled to the *portio legitima*.

Apart from direct legislation the law of wills was from time to time further modified by the edicts of the Praetors who by the application of principles more in conformity with equity and justice adopted the law to the exigencies of the period. This influence of the Praetors continued for some time under the Empire. In the time of Hadrian the Praetorian law was consolidated by Julianus in what is known as the Perpetual Edict.

Under this Edict which was approved by the Senate in the year 131 A. D. we have an almost entirely new form of will, which is sometimes called the Praetorian will. The form of mancipation or the ceremonies necessary to the will *per æs et libram* had entirely dropped. All that was required was that the will should be authenticated by the affixing of the seals of seven witnesses, two of whom corresponded with the *libripens* and the *familae emptor* and the remaining five with the five witnesses of the mancipation.[1] Under the new system of wills the person designated as the heir took, not the legal estate, for the mancipation was omitted, but only the equitable estate or *bonorum possessio*, but he had all the proprietary privileges of the heir by the Civil, as opposed to the Praetorian or Edictal, law.

Before the time of Justinian when the progress of society and the imperial Constitutions had, to a great extent, produced a fusion of the civil and praetorian law, a form of will had been established which derived its validity from three sources, namely the Civil law, the Praetorian Edict and the Imperial Constitutions, and on this account it was called *testamentum tripartitum*. Seven witnesses and their presence at one time for the purpose of giving the testament the requisite formality were required by the Civil law. In accordance with the Imperial Constitutions, the subscr ptions of the testator and of the witnesses were necessary, while under the Edict of the praetor, the witnesses were required to affix their seals.[2] This last will is that generally known as the Roman will, but it would appear to be the will of the Eastern Empire only, the researches of Savigny having shown that in Western Europe the old Mancipatory testament continued to be the form in use far down in the Middle Ages.[3]

The English Law of Testamentary Succession as to personal property is, as I have already stated, to a great extent merely a modified form of the institution by which the postumous devolution of property was regulated by the Romans in later times, and as the Indian Succession Act which forms a not inconsiderable portion of the law relating to wills in India is mainly based upon the English

[1] Just. II, xvii, § 6.

[2] Just. II, x § 3.

[3] Maine's Ancient Law, p. 214.

law, I have deemed it right to give the foregoing brief outline of the main features of the history of the Roman testament. I shall now proceed to deal in more detail with the more immediate subject of this Course of lectures—*viz.*, the law of testamentary devise as now administered in India.

As might be expected in a country such as India where we have various races widely different in their laws and creeds, and where the legislature has from time to time passed enactments, limited in some cases in their application to particular territories, and in others to particular races or to persons professing particular creeds, the systems of law relating to wills now being administered in British India are various.

The Mahomedans have a special law of wills of their own which they claim to be a divine institution expressly sanctioned by the Koran.[1] Among them, however, the right of testamentary devise extends, as we shall see hereafter, only to one-third of the testator's property, except with the consent of the heirs. It may, however, surprise many in these days to learn that the right or power of a Hindu to make a disposition of his property by will is not provided for or even recognised by the texts on Hindu law. There is in fact no word in the Indian languages which accurately conveys the conception of a will as understood by Western lawyers. The idea of making a disposition of property to take effect after the death of the giver, as has been frequently pointed out by writers on Hindu law, is really opposed to the fundamental principle of the joint Hindu family.[2] The practice among Hindus of making wills has grown up in comparatively modern times. After having obtained judicial sanction, it has finally received the sanction of the Legislature.

In Bengal, where the right of alienation of property was first and most extensively established, it may be affirmed that the validity of the wills of Hindus was fully recognised in 1831, but it can hardly be said that such wills were beyond dispute in Madras and Bombay till considerably later.[3] It was not apparently till 1859 that the validity of such wills was actually decided in Madras. In that year, in the case of *P. Narrainsvami Chetti* v. *P. Arunachella Chetti*,[4] a will of a Hindu was held to be valid, so far at least as it disposed of self-acquired property, and in 1863 in the case of *Vallinayagam Pillai* v. *Pachche*[5] it was apparently settled that the testamentary power of a Hindu in respect of property, whether ancestral or self-acquired was co-extensive with his independent right of alienation *inter vivos*. About the same time the right of

[1] Koran Ch. V, p. 97, Sale's Translation.

[2] 2 Dig. 516. See 1 Str. 255, 2 Str. 417, 419, 421, 428, 450; *Vallinayagam Pillai* v. *Pachche* 1 Mad., H. C. R., 326.

[3] See *Narottam Jugjivan* v. *Narsandas Harikisandas*, 3 Bom. H. C. R. A. C., 6.

[4] 11 Mad. S. D. 1860 p. 115.

[5] 1 Mad. H. C. R., 326.

Hindus in the North Western Provinces to dispose of their property by will was established by the Judicial Committee of the Privy Council.[1] The first reported cases, so far as I can find, in which it was there recognised were decided by the Privy Council in 1846 and 1862.

In 1881 a Bill intended to apply to the whole of India and to supersede the Hindu Wills and Probate and Administration Acts, was introduced into the Legislative Council. Its object was to declare the extent of the testamentary power of Hindus and Buddhists[2] and to provide rules for the execution, attestation, revival, interpretation and probate of their wills. In the usual course, opinions were called for and collected from Commissioners and other selected Government officers, from public bodies, private individuals, town and village elders, barristers, pleaders and others, with a view to ascertaining how far testamentary power had already been recognised throughout British India. From the opinions so collected, it appears that in the Punjab and Oudh the right of testation was one until recently very rarely exercised, but the practise of making wills was there rapidly spreading. To some extent the right of testation had already been recognized by the Legislature in 1869, for under the Oudh Estates Act, 1869,[3] every taluqdar and grantee and every heir and legatee of a taluqdar and grantee of sound mind and not a minor was declared, subject to the provisions of the Act,[4] competent to bequeath by his will to any person the whole or any portion of his estate, or of his right and interest therein.[5] The spread among landholders of the practice of making wills in Oudh, it was said has been considerably influenced by the example of the taluqdars who, had generally, since the passing of the Act, made wills. There is a reported case of the Chief Court of the Punjab in which it was held in 1869 or 1870 that what a village proprietor might do whilst he was alive, he might do by an instrument which should take effect after his death.[6]

From Burmah, where the population is mainly Buddhist, a large number of opinions upon the proposed Bill were forwarded to Government. It would

[1] *Rewan Persad* v. *Radha Beeby* 4 Moo. I. A. 137; *Nana Narain Rao* v. *Hurree Punth Bhao*, 9 Moo. I. A., 96.

[2] Section 3 of the Bill declaring the extent of testamentary power is as follows: "Every Hindu and Buddhist may bequeath property in the cases and to the extent in, and to which he may transfer the same: provided that when the testator is a member of an undivided family and his right to bequeath conflicts at the time of his death with any right of the surviving members of such family, the latter right shall prevail." The Bill has not been passed.

[3] Act I of 1869.

[4] Act I of 1869, ss. 11—20.

[5] Act 1 of 1869, s. 11.

[6] *Avokha* v. *Mohun Lal*, 2 Punjab Record, 1870. See Boulnois and Rattigan's Customary Law, p. 87.

appear doubtful from these opinions whether the right or power of disposing of property by will has ever been fully recognised in Burmah. It is true that in one reported case, that of *Kokya Dyne*,[1] probate was granted in the case of a will of a Burman, and it seems to have been considered, in that case, that no special formulas were necessary for the execution of a will by a Burman. The point as to the right as a matter of law or usage, among Burmans to make a will was not really raised. In 1880 a special Court at Rangoon consisting of the Judicial Commissioner and the Recorder held that a Burman had no power to make a valid will. I have had the privilege of seeing the various opinions collected in Burmah—opinions of Commissioners, judicial officers, pleaders and others most likely to be able to give the Government valuable assistance and information, not only as to the existence of any custom and practice of making wills among the Burmese, but as to the wishes of the people themselves in regard to any intended legislation upon the subject. The general opinion seems to be that there is no right of testamentary disposition among the Burmese and the popular view is very clearly against the introduction of a law creating such a right amongst them.

It is not unlikely that with the opening out of Upper Burmah and the subsequent settlement there of Europeans and natives from other parts of India for the purposes of trade and with the increased development of commerce, the Burmese may come to desire to have as full a power of testamentary disposition either recognised, if it does exist, or given to them by Statute, if it does not exist, as is recognised in other parts of India. There is nothing now in Burmah analogous to that of the joint family among Hindus. A kind of deathbed disposition seems to be recognised not so much because of any assumed right to make such a disposition as because from feelings of affection, respect or even superstition, the last wishes of the deceased are considered to be entitled to weight among the members of his family.

In 1862 the practice of making wills, had been so far adopted among Hindus generally throughout India that in that year the Judicial Committee of the Privy Council were able to declare that it might be taken that, whatever might have formerly been considered the state of the Hindu Law as to testamentary power over their property, that power had been long recognised and must now be considered as completely established.[2]

It will be seen by reference to the Regulations of the Governor-General in Council that the Legislature had already from time to time, beginning as far as I have been able to ascertain in 1793, been forced to recognise, if not to sanction, the existence of the practice among Hindus of making wills. Sections 5 and 6 of

[1] 2 B. L. R., Ap. 79; See *Fuckeerooddeen Adam Shaw*, 11 W. R., 413.

[2] See *Soorjeemoney Dossee* v. *Denobundhoo Mullick*, 9 Moo. I. A. 123, p. 135.

Regulation XI (Ben.) of 1793 (A Regulation for removing certain restrictions on the operation of the Hindu and Mahomedan Laws with regard to the inheritance of landed property subject to the payment of Government Revenue) provided that nothing in the Regulation contained should be construed to prohibit any actual proprietors of land bequeathing or transferring by will or by a declaration in writing or verbally, either prior or subsequent to the 1st July 1794, his or her landed estate entire to his or her eldest son or next heir or other son or heir in exclusion of all their sons or heirs, or to any person or persons, or to two or more of his or her heirs in exclusion of all other persons or heirs in the properties, and to be held in the manner which such proprietor may think proper, provided that the bequest or transfer were not repugnant to any Regulations that have been passed or might be passed by the Governor-General in Council, or contrary to the Hindu or Mahomedan Law and that the bequest or transfer whether made by will or other writing or verbally should be authenticated and made before such witnesses and in such manner as those laws and Regulations respectively did or might require.[1]

In the same year another Regulation, XXXVI (Ben) of 1793, was passed for the purpose of establishing a registry in each district for (among other documents) *wusseatnamahs* or wills, in order as stated in the preamble "to afford persons the means of obviating, as far as may be practicable, litigation respecting the authenticity of their wills or any written authority they may grant to their wives to adopt sons after their death." From the use of the word *wusseatnamah* in the body of the Regulation, and the reference to powers of adoption, it would appear that the Regulation was intended to have reference to the wills of natives of India as well as to those of Europeans.

Regulation XLV of 1795 which applied to the Province of Benares by s. 6 provided that its provisions should not be deemed to prohibit any actual proprietors of land from bequeathing or transferring by will his or her land in certain specified ways, provided that the bequest or transfer was not contrary to the Hindu or Mahomedan Law, and that it was authenticated by, or made before such witnesses, and in such manner as those laws required.

By s. II of Regulation V of 1799, which was applicable to the Provinces of Bengal, Behar, Orissa and Benares, it was declared that in all cases of a Hindu, Mussalman or other person subject to the jurisdiction of the Zillah Courts having at his death left a will and appointed an executor or executors to carry the same into effect, and in which the heir to the deceased might not be a disqualified landholder subject to the superintendence of the Court of Wards, the executors so appointed were to take charge of the estate of the deceased and

[1] See *Beer Pertab Sahi* v. *Maharajah Rajendra Pertap Sahi*, 12 M. I. A. 1, (S. C.), 9 W. R. (P. C.) 15.

proceed in the execution of their trusts according to the will of the deceased, and the laws and usages of the country, without any application to the Judge of the *Dewani Adalat*, or any other officer of Government for his sanction, and the Courts of Justice were prohibited from interfering in such cases except on a regular complaint against the executors for a breach of trust or otherwise. This section, however, so far as it relates to executors of persons who are not Mahomedans, but are subject to the jurisdiction of a District Court in the territories subject to the Lieutenant-Governor of Bengal, has been repealed by s. 4 of the Hindu Wills Act, XXI of 1870. The Regulation, however, still applies in the Province of Benares, and Act XV of 1874, Sched. V, has declared that the Regulation is to be in force all over the North-Western Provinces.[1]

In Madras a Regulation was passed in 1829[2] declaring that wills left by Hindus should have no force whatever except so far as they might be in conformity with the provisions of the general Hindu law obtaining in that province. That Regulation declared that cl. 2 of section XVI of a former Regulation[3] which, like the Bengal Regulation, V of 1729, originally provided that in all cases of a Hindu, Mussulman or other person subject to the jurisdiction of the Zillah Courts having at his death left a will and appointed an executor or executors, the executors should, except in certain cases mentioned, take charge of the estate of the deceased and proceed in execution of the trusts created, did not apply to Hindus.

In Bombay a Regulation was passed in 1827 to provide for the formal recognition of executors appointed by persons dying and leaving property, and for the proof of wills and registration of wills which had been duly proved.[4] The Regulation is silent as to the race or creed of the persons to whose estates it is applicable.

In 1838 an Act[5] was passed by the Governor-General in Council applying certain provisions to the wills made after the 1st February, 1839, by persons whose personal property could not by the law of England pass to their representatives without probate or letters of administration obtained in one of Her Majesty's Supreme Courts of Judicature. This Act still applies in the case of wills made after the 1st February, 1839, and before the passing of the Indian Succession Act. The testamentary clauses are somewhat similar to those contained in the Succession Act, and having regard to the fact that in these days comparatively few wills to which the Act is applicable come before the Courts, it has not been deemed

[1] See Probate and Administration Act, which, subject to the provisions of s. 2, applies to the whole of British India.

[2] Reg. V of 1829 (Mad.).

[3] Regulation III of 1802.

[4] Regulation VIII (Bom.) of 1827.

[5] Act XXV of 1838.

at all necessary to enlarge upon its provisions. It is curious to note, however, that the provisions of the Act were made to apply, and did for many years apply, to all classes in the Straits Settlements, Mahomedans, Hindus, and Chinese and Englishmen alike.[1] They were, however held not to be applicable to the wills of persons not entitled by birth or domicil to have applied to them the actual law of England.[2]

The Indian Succession Act was passed in 1865, but it did not apply to Hindus By s. 2, it is declared to constitute the law applicable to all cases of testamentary succession, but by s. 331 the provisions of the Act are declared not to apply to testamentary succession to the property of any Hindu,[3] Mahomedan or Buddhist, nor to any will made before the 1st day of January 1866, and by s. 332 the Governor-General in Council was given power from time to time by an order either retrospectively from the passing of the Act, or prospectively to exempt from the operation of the whole or any part of the Act the members of any race, sect or tribe in British India, or any part of such race, sect or tribe, to whom he might consider it impossible or inexpedient to apply the provisions of the Act.

It is pointed out by Mr. Stokes in his commentary on the Succession Act, that in section 331 the term "Hindu," used as it is in conjunction with the terms Mahomedan and Buddhist, is used as a theological term, and as denoting a person professing any form of the Brahminical religion or religion of the Puranas,[4] and would therefore, as the Courts have since held, include Jains,[5] and Sikhs.[6] As to Jains, it has been, in fact, held that the ordinary Hindu law, in the absence of any special custom varying the same, is applicable to them.[7] Sikhs are in the main governed by the Mitakshara school of Hindu law.[8] Cutch Memons are not included in the term Hindu.[9] They are Mahomedans to whom Mahomedan Law is to be applied except when an ancient and invariable custom to the contrary is established

[1] See Gazette of India, Part V, 1889, p 60

[2] *Greenway* v. *Hogg*, on appeal, Bourke's Rep A. O. C. 111; S. C 1 Coryton's Rep. 97.

[3] This term includes Jains—*Bachebi* v *Mukhan Lal*, I. L R, All., 55; *Chotay Lall* v. *Chunnoo Lall*, L. R., 6 I. A. 15 S. C., I. L. R., 4 Cal., 744; *Bhagvandas Tejmal* v. *Rajmal*, 10 Bom., H. C R, 241; *Lallah Mahabeer Pershad* v. *Kundur Koonwar*, 2 Ind Jur. 312

[4] See *Abraham* v *Abraham*, 9 M. I. A, p 239

[5] *Bachebi* v. *Mukhan Lall*, I. L. R., 5 All., 55; *Chotay Lall* v. *Chunnoo Lall*, L R, 6 I. A. 15; (S. C.) I L. R., 4 Cal., 744; (S. C.), 3 C. L. R., 465; *Bhagvandas Tejmal* v. *Rajmal*, 10 Bom., H. C. R, 241; *Lallah Mohabeer Pershad* v *Kundur Koonwar*, 2 Ind Jur., 312.

[6] *Doe d. Kissen Chunder Shah* v. *Bindam Beebee*, 2 Morl Dig. 22.

[7] *Chotay Lall* v. *Chunnoo Lal*, L R., 6 I. A. 15; I. L R, 4 Cal., 744; 3 C L R, 465

[8] See *Doe d. Kissen Chunder Shah* v. *Bindam Beebee*, 2 Morl. Dig. 22.

[9] *In re Haji Ismail Abdulla*, I. L R., 6 Bom., 452

Mr. Stokes on the authority of Mr. H. H. Wilson,[1] has expressed his opinion that the term Hindu would not include the Baba Lalis "who adore but one God dispensing with all forms of worship and directing their devotions by rules and objects derived from a medley of Vedanta and Sufi tenets"; nor Pran Nathus or Dhamis in Bundelkhand who consent to the real identity of the Hindu and Mahomedan creeds; nor the Sadhus, a sect of Hindu Sectarians who are found chiefly in the upper parts of the Doab from Farukabad to beyond Delhi; nor perhaps the Satnamis who profess to worship one God, though they recognise the whole Hindu Pantheon; nor the Cira Narayanis who simply profess the worship of one God and admit proselytes alike from Hindus and Mahomedans; nor Cunyavadas whose doctrines are atheistical;[2] nor does it include Santhalis, Kols, Sub-Himalayan and other Bhutan tribes, Nagas of Assam, the Kus, Gonds, Bhils, Rajmahalis, Khonds of Orissa, Todas of the Nilgiris, Shonars and other demonolators of Southern India.[3]

Under the term "Buddhists" apparently Tibetans and Lepchas in British India are included.

The Indian Succession Act, however, includes the following classes of persons

(1.) Europeans by birth or descent domiciled in British India.[4]

(2.) East Indians or persons of mixed European and Native blood.

(3.) Jews,[5] except in Aden, where they have been exempted by notification under s. 332.[6]

(4.) Armenians.[7]

(5.) Parsees, in regard to testamentary succession.[8]

(6.) Native Christians and their Christian descendants.[9]

(7.) Natives of India other than those comprised in the terms Hindu, Mahomedan and Buddhist, and not excluded under s. 332 of the Act.

(8.) All Europeans in India not having an Indian domicile, except in so far as the Act relates to the succession to moveable property, which, according to the almost universal rule follows the domicile.[10]

[1] Works, pp. 347—359.

[2] Stokes' Indian Succession Act, p. 200.

[3] *Ibid.*, p. 201.

[4] As to domicile, see Intestate and Testamentary Succession in India, pp. 8—19.

[5] *Gabriel* v. *Mordakai*, I. L. R., 1 Cal. 148; *S. E. Musleah* v. *E. E. Musleah*, 1 Boul., 234; *Musleah* v. *Musleah*, Fult. 420.

[6] Gazette of India, 1886, p. 707.

[7] See *Aratoon H. Aratoon* v. *C. Aratoon*, 7 Select Reports, 528, *Stephen* v. *Hume*, 1 Fult. 224, p. 242, *Aratoon* v. *Johannes*, Morton (by Montrion) 19.

[8] Intestate Succession among Parsees is now regulated by Act XXI of 1865.

[9] *Ponnusami Nandan* v. *Dorasami Ayyan*, I. L. R., 2 Mad. 209; *Joseph Vathiar*, 7 Mad. H. C. R., 121. See *Abraham* v. *Abraham*, 9 M. I. A., p. 239; *Admin.-General* v. *Anandachari*, I. L. R., 9 Mad. 466; *Tillis* v. *Saldanha*, I. L. R., 10 Mad., 69.

[10] *Birtwhistle* v. *Vardill*, 7 Cl. and Fin. 895 (S. C.), 5 B. and C., 438.

Under s. 332 of the Indian Succession Act, Native Christians in the Province of Coorg have been exempted from the provisions of the Indian Succession Act retrospectively from the 16th March 1865,[1] on which date the Act received the assent of the Governor-General in Council. Khasias and Syntengs in Assam were similarly exempted as having special laws of inheritance incompatible with the provisions of the Indian Succession Act.[2]

When the Indian Succession Act was under the consideration of the Legislature it was at one time proposed to extend the testamentary portion of the measure to natives of India[3] but it was felt then, as pointed out by Sir Henry (then Mr.) Maine in the Statement of Objects and Reasons for the Bill which afterwards passed into law as the Hindu Wills Act, 1870, that sufficient information was not before the Council to justify an immediate extension in that direction, and accordingly the proposal was not then carried out. Steps, however, were taken to obtain information upon the subject. Doubts, it was said, were entertained as to how far it would be politic to interfere with the power to make oral wills which Mahomedans had always possessed, and evidence was wanting as to the propriety of restricting Natives of India in creating perpetuities and in making bequests to religious and charitable uses, and it was for that reason that s. 331 excluding Hindus, Mahomedans, and Buddhists from the operation of any part of the Indian Succession Act was inserted as a temporary provision. Some months after the passing of that Act, a circular, dated the 12th August, 1865, was issued by the Government of India to the various local Governments, calling for information respecting the advisability of extending the provisions of the testamentary portion of the Act to Natives of India.

The circular drew attention to the fact that there were no securities such as the requirement of writing, signature and attestation, as under the English Law, for the due exercise of that power by Natives of India. It also pointed out that although in England nuncupative wills had long been placed under considerable restrictions as to the persons by whom they could be made, as to the witnesses required to be present, and as to the time within which testimony was admissible to prove the making of such wills :—in India the Courts were compelled to recognise such wills when made by Hindus of any age or calling and under any circumstances whatever. It was observed that the fraud of bringing forward false wills was encouraged by the non-requirement of writing; that the evidence setting up a false nuncupative will might revoke a true written one, and that even in the case of a genuine testamentary disposition the certainty of writing

[1] Gazette of India, July 25th, 1868, p. 1094. Intestate and Testamentary Succession, p. 315.

[2] Gazette of India, 1887, p. 512.

[3] Gazette of India, Pt. V, 1869, p. 60.

was replaced by the frailty of memory. Further remarks were made as to the absence in the case of Native testators of any restraints on the creation of perpetuities and on devises to religious or charitable uses, as to the non-requirement of probate of their wills, whether written or oral, and as to the difficulty of ascertaining the character and powers of a Native executor.[1]

To this circular replies were received from all the local authorities accompanied in almost every instance by papers written by such European and Native gentlemen as were deemed best capable of advising in the matter. The general result of the opinions was compendiously expressed as follows :

(1.) The practice of making nuncupative wills should be abolished, and the provisions of the Indian Succession Act as to the execution of wills and codicils should be adopted in the case not only of Hindus but of Mahomedans.

(2.) Marriage should not in the case of a Native testator revoke his will. In other respects the provisions of the Succession Act as to revocation should be followed.

(3.) It is inexpedient to impose in the case of Native testators any restrictions on the exercise of the testamentary power in favour of religious or charitable uses or for the creation of perpetuities.

(4.) The provisions of the Succession Act as to the interpretation of wills should, with some few exceptions, be adopted.

(5.) Probate should be made compulsory, and the provisions of the Succession Act as to administration with the will annexed, and as to the powers and duties of an executor should be extended with some slight modifications.[2]

As the outcome of the opinions collected in response to the circular issued by the Government after the passing of the Indian Succession Act, the Hindu Wills Act, XXI of 1870, was passed in 1870;—providing rules for the execution, attestation, revocation, etc. and probate of the wills not only of Hindus, but of Jains and Sikhs and Buddhists in the territories subject to the Lieutenant-Governor of Bengal and in the towns of Madras and Bombay.[3] Originally it had been intended that the Act should apply to Hindus and Buddhists only and to the Presidency towns. It was not proposed to interfere with the elaborate system of testamentary law of the Mahomedans as it was considered that to impose upon the Mahomedans of India a body of rules, which might have the effect of superseding any portion of their then existing law, might create alarm and discontent. Such considerations, however, had little application in dealing with the wills of Hindus. The fact that the law as to Hindu wills which had grown

[1] Gazette of India, Pt. V of 1869, p. 60.

[2] Statement of Objects and Reasons, Gaz. of India, Pt. V, 1869, p. 60.

[3] By s II (*a*) the Act applies to all wills and codicils made by any Hindu, Jain, Sikh or Buddhist on or after the 1st September 1870 within the territories or the local limits of the ordinary Original Civil Jurisdiction of the High Courts of Madras and Bombay.

up and was being recognised in the Courts was not a portion of the ancient Hindu law, but was of comparatively modern origin, and was assumed (wrongly as it will be submitted hereafter) to have been the creature of the English Law Courts, was considered to justify the Legislature in subjecting the wills of Hindus to such restrictions as were deemed necessary and expedient

The next Act dealing with the subject of wills was the Probate and Administration Act, V of 1881. The portions of the Indian Succession Act relating to the grant of probate and administration, and the powers, duties and procedure of executors and administrators, omitting those sections which make it compulsory to obtain probate or administration, and which lay down the order according to which the various persons interested are entitled to administration on intestacy, were made applicable, in some cases in a modified form, to the estates of all persons not then governed by the Indian Succession Act, with a proviso that except in case to which the Hindu Wills Act applies, (and for which provision had already by that Act been made for granting probate and letters of administration) no Court in any local area beyond the limits of the towns of Calcutta, Madras, and Bombay and the territories for the time being administered by the Chief Commissioner of British Burmá, and no High Court in the exercise of the concurrent jurisdiction over such local area thereby conferred, should receive applications for probate or letter of administration, until the Local Government had with the previous sanction of the Governor-General in Council by a notification in the official Gazette authorized it so to do.[1]

In exercise of the power conferred upon him the Lieutenant-Governor of Bengal, authorized the High Court of Judicature at Fort William in Bengal, throughout the territories subject to the Lieutenant-Governor of Bengal, and all District Judges within the said territories, and such judicial officers as the High Court might, from time to time, appoint as District Delegates, to receive applications for probate and letters of administration.[2] By another notification, the Chief Commissioner of Assam in 1881 authorized the High Court of Judicature at Fort William in Bengal, throughout the territories subject to the Chief Commissioner of Assam, and all District Judges, and such judicial officers as the High Court may, from time to time, appoint as District Delegates, to receive applications for probate and letters of administration [3]

Similar notifications have been issued with reference to the Punjab,[4] Andaman and Nicobar Islands,[5] and Hyderabad Assigned Districts [6]

[1] See Act XX of 1886

[2] Calcutta Gazette 1881, p. 445.

[3] Assam Gazette 1881, p 337.

[4] Punjab Gazette, 6th Oct. 1881, p. 483.

[5] Andaman Gazette, 17th June 1881, and Gazette of India, 28th May 1881, p 214

[6] Gazette of India, 5th Novr. 1881, p. 540. The District Delegates Act, VI of 1881, is also made applicable in the Hyderabad Assigned Districts : *Ibid.*

The Indian Succession Act, the Probate and Administration Act, and the District Delegates Act, have been declared to be in force in the Scheduled Districts of Hazaribagh, Lohardugga and Manbhum and Pergunnahs Dhalbhum and Kolhan in the district of Singhbhum.[1]

Having regard to the different enactments which have been passed by the Legislature, it will be seen that there are at least the following classes of wills—differing in some way in respect of the rules as to execution, attestation or other formalities, or as to the machinery by which their provisions are to be carried out or otherwise—

I. Wills of Hindus, Sikhs, Jains and Buddhists outside the limits of the territories subject to the Lieutenant-Governor of Bengal and the local limits of the Ordinary, Original Jurisdiction of the High Courts of the towns of Madras and Bombay, *i. e.*, of persons of those races or creeds to whom the Hindu Wills Act does not apply.

These may be subdivided into (*a*) wills to which the Probate and Administration Act applies and (*b*) wills to which that Act has not been applied under s. 2 of that Act.

This class will include the wills of Hindus in Benares and the other provinces in the North West[2] to whom s. II of Reg. V of 1799 is applicable.

As to Buddhists, we have seen that in Burmah the Buddhists apparently have no indigenous law of testamentary devise of their own, but the Probate and Administration Act[3] in places where it applies or is made by notification to apply, is specially applicable to the Wills of Buddhists, and s. 155 of that Act validates grants of Probate made in British Burmah made before the Act came into force.[4]

II. Wills to which the Hindu Wills Act applies, *viz.*:—wills of Hindus, Sikhs, Jains and Buddhists made after the 1st September, 1870, within the territories of the Lieutenant-Governor of Bengal and the local limits of the Ordinary Original Jurisdiction of the High Courts of Madras and Bombay and apparently also wills of such persons made outside those territories and limits so far as relates to immoveable property situate within those territories or limits.

[1] Gazette of India, Oct. 22nd, 1881, p. 504.

[2] See Act XV of 1874, Sched. V, which made Regulation V of 1799 applicable to those provinces. S. 2 of the Regulation has been repealed by s. 4 of the Hindu Wills Act, so far as relates to the executors of persons who are not Mahomedans but are subject to the jurisdiction of a District Court in the territories subject to the Lieutenant-Governor of Bengal.

[3] V of 1881.

[4] See *In the goods of Kokya Dyne*, 2 B. L. R., A. C., 79; (S. C.), 10 W. R. 417; In the *goods of Fackerooddeen Adam Shaw*, 11 W. R., 413. See s. 2 of Probate and Administration Act.

III. Wills governed by Act XXV of 1838.[1]

IV. Wills governed by the Indian Succession Act. The persons to whose wills this Act applies have already been referred to.[2]

V. Wills as to moveable property of persons not domiciled in British India. Such wills are governed by the law of the domicile wherever that may be.[3] This class of wills it is impossible to discuss here, as such a discussion would practically involve a disquisition on the law of wills as to moveable property of all other countries. It may, however, be pointed out that it has been held that officers of the Crown coming to India in the time of the East India Company, did not lose their domicile, whereas it seems that officers of the East India Company did.[4]

VI. Wills of Mahomedans.

In dealing with these classes of wills it must be borne in mind that the Probate and Administration Act which applies, in cases to which the Indian Succession does not apply, to the whole of British India, applies in the case of every Hindu, Mahomedan, Buddhist, and person exempted under s. 322 of the Indian Succession Act[5] dying before, on, or after the 1st of April 1881, with the proviso that, except in cases to which the Hindu Wills Act, applies, no Court in certain specified areas should receive applications for probate or letters of administration until authorized by notification to do so.

With reference to the first class one must be guided by the rules which have been grafted on the Hindu Law by custom and by the decisions of the Courts, and the Regulations of the Governor-General in Council so far as they may apply, not only as to the formalities required for the execution of wills, but also as to the extent to which, and mode in which, a Hindu may validly exercise testamentary power, and, except in cases where the Probate and Administration Act is made applicable, as to the manner in which the provisions of the will are to be carried out. Thus for example under the law applicable to these wills, that is, the Hindu law as it existed previous to the passing of the Hindu Wills Act, no particular formalities are required in the execution or attestation of Hindu wills.[6] So that

[1] See p. 9 *supra*.

[2] See p. 11 *supra*.

[3] See Indian Succession Act, s. 5; *Birtwhistle* v. *Vardill*, 2 Cl. and F. 571: See also *In the goods of Elliot*, I. L. R., 4 Cal., 106; (s. c.) 2 C. L. R., 496. As to payment of debts, see s. 203 of the Indian Succession Act as amended by s. 9 of Act VI of 1889.

[4] *Bruce* v. *Bruce*, 1 B. and P. 229 note; *Munroe* v. *Munroe*, 5 Mad., 879: *Forbes* v. *Forbes*, Kay, 341; *Jopp* v. *Wood.*, 3 De G., J. and S. 616; *Wauchope* v. *Wauchope*, Court of Sessions Rep. (Scot.) 4th Series, Vol. IV, p. 945, (s. c.) 2 C. L. R., 497 note; *In the goods of Elliot*, I. L. R., 4 Cal., 106, (s. c.) 2 C. L. R. 496. See *In the goods of Wemyss*, I. L. R. 4 Cal., 721.

[5] See supra, p. 10.

[6] *Vinayak* v. *Narayan Jog* v. *Govindrav Chintamun Jog*, 7 Bom. H. C. R. 224; *Mancharji Pestonji* v. *Narayan Lukshuanji*, 1 Bom. H. C. R. 77; *Crinivas Ammal* v. *Vijayammal*, 2 Mad, H. C. R., 87; *Beer Pertab Sahee* v. *Muharaja Rajendra Pertab Sahee*, 12 Moore's I. A., 1.

a Hindu whose will comes within this class may make a nuncupative or oral will, in respect of either moveable or immoveable property,[1] but in case of such a will the strictest proof is required.[2] A testamentary paper of this class, so long as it is in accordance with the instructions of the testator and is assented to by him does not by Hindu law require signature,[3] nor, where it is signed, does the signature require attestation.[4] The form of a testamentary paper is immaterial under Hindu law if it contain the wishes of the testator. Thus a petition presented to a Collector in the year 1830 was held to amount to a will.[5] So also was a communication as to the disposition of his property after his death made by a taluqdar at the request of Government.[6] In the case of *Kallian Singh* v. *Sanwal Singh*,[7] a sonless Hindu widow, who was in possession of her deceased husband's estate, made a statement before a Revenue official, which was recorded by him, to the effect that she wished the property to go to her nephew after her death, and it was held that this statement operated as a will. A minor, it has been held, is incapable, under Hindu law, of making a will,[8] minority terminating at the age of sixteen years, but a married woman has power to make a will of her *stridhan* or other property which is absolutely under her control unless it is immoveable property given to her by her husband,[9] or which is inherited from males, and in which she has only a limited estate. Again, under Hindu law, as opposed to the later Statutory law, a will may be revoked by parol, and where authority has been given by the testator to destroy a will with the intention of revoking it, that operates as a revocation although the instrument is not in fact destroyed.[10]

In determining the construction of a will what we must look to is the intention of the testator no less under Hindu Law than under English Law, and there is no difference between the one law and the other as to the materials from which that intention is to be collected. Primarily the words of the will are

[1] *Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, 12 M. I. A., 1; *Crinivas Ammal* v. *Vijayammal*, 2 Mad. H. C. R., 37; *Subbayya* v. *Surayya*, I L. R., 10 Mad., 251.

[2] *Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, 12 M. I. A., 1.

[3] *Tarachand Bose* v. *Nobeen Chunder Mitter*, 3 W. R., 138; *Radhabai* v. *Gonesh Tatya*, I. L. R. 3 Bom., 7.

[4] *Radhabai* v. *Gonesh Tatya*, I. L. R., 3 Bom., 7; *Mancharji Pestonji* v. *Narayan Lukshumanji*, 1 Bom., H. C. R., 77.

[5] *Mahomed Shumsool* v. *Shewukram*, L. R., 3 I. A., 7.

[6] *Hurpurshad* v. *Sheo Dyal*, L. R., 3 I. A., 258.

[7] I. L. R., 7 All., 163.

[8] *Cossinath Bysack* v. *Purroosoonderry*, 2 Morley's Dig. 198.

[9] *Teencowrie Chatterji* v. *Dinonath Banerjee*, 3 W. R., 49; *Venkata Rama Rao* v. *Venkata Suriya Rao*, I. L. R., 2 Mad., 333.

[10] *Pertab Narain Singh* v. *Maharanee Subhao Koer*, I. L. R., 3 Cal., (P. C.) 626; (S. C.) 1 C. L. R., 113.

to be considered. But the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case, these circumstances must be regarded.[1] It is not necessary that technical words should be used. But if the law has attached to particular words a particular meaning, or to a particular disposition a particular effect it is to be assumed that the testator, in the dispositions which he has made, had regard to that meaning or that effect.[2] So by Hindu law as under the English law and Indian Statutory Law if a devise of an estate be made in general terms without express words of inheritance it will in the absence of a conflicting context carry the whole interest of the testator.[3] In construing wills with bequests to Hindu females, the Courts (not only under Hindu law but under the Statutory law, as we shall see,) have thought it right to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property, it being assumed that a Hindu generally desires that an estate, especially if it be ancestral, should be retained in the family Accordingly it may be taken as an established rule that, in the absence of express words showing such an intention, a devise to a female does not confer an estate of inheritance but carries only a life estate or a widow's estate as understood by Hindu law.[4]

To the classes of wills to which I have referred, one might add another class, *viz.*, wills in the construction of which the Courts are to be guided by equity, justice and good conscience under the Regulations.[5] This class is necessarily limited.

The extent of the testamentary power of Hindus whether subject to the ordinary Hindu law or to the statutory law will be considered hereafter.

[1] *Sreemutty Soonjeemoney Dossee* v. *Denobundoo Mullick*, 6 M. I A , 550, per Turner, L. J.

[2] Ibid.

[3] *Tagore* v. *Tagore*, 9 B. L. R., p 395 ; Indian Succession Act, s 82

[4] *Koonjbehary Dhur* v *Premchand Dutt*, I. L. R., 5 Cal., 684 ; *Mahomed Shumsool* v. *Shewukram*, L. R 3 I. A., p. 14 ; S. C. 14 B. L. R , 226 ; *Hirabai* v. *Lakshmibai*, I. L. R , 11 Bom., 579 ; see *Prosunno Coomar Ghose* v. *Tarrucknath Sirkar*, 10 B L. R., 207 ; *Punchoo Money Dossee* v. *Troylucko Mohiney Dossee*, I. L. R , 10 Cal., 312. See s. 82 of the Indian Succession Act.

[5] See Reg. III (Ben.) of 1793, s. 21 ; Reg. II (Mad.) 1802, s 18 · *Broughton* v. *Pogose*, 12 B. L. R , 74. *Abraham* v. *Abraham*, 9 M. I. A , 195, see p 239

LECTURE II.

HISTORY OF THE HINDU WILL.

Testamentary Power among Hindus—Growth and Early History of Hindu Wills—*Quasi* testamentary character of the faculty of adoption—Example of Englishmen making wills among Hindus—Influence of Brahmins—Jurisdiction of Supreme Court as to probate of Hindu wills—Early practice of the Courts as to probate—Bibee Muttra's case—Influence of English Courts and lawyers—Example of Mahomedan Testators among Hindus—Hindu Wills, whether of foreign origin—Earliest existing Hindu Will—Earliest reported cases as to Hindu Wills—Nudiya Rajah's case—Establishment of validity of Hindu Wills in Bengal—Early recognition of Hindu Wills by Legislature—Establishment of validity of Hindu Wills in Madras—Early recognition of Hindu Wills by Legislature in Madras—Establishment of validity of Hindu Wills in Bombay—Declaration of Judicial Committee of Privy Council as to general recognition of testamentary power among Hindus.

The law relating to the Wills of Hindus, as I have said, is of comparatively modern origin. Mr. Montriou in the Introduction to his treatise on the Hindu will of Bengal has remarked that the *Dharma* or infallible rules and schemes of conduct of Hinduism fully regulate posthumous devolution and succession both proprietory and personal, but no express or literal prohibitory enactments in regard to posthumous disposition such as grew up in the civil law and such as are promulgated in the Koran and other systems are found in the Hindu Code, yet neither in word or spirit do the shasters sanction or contemplate unrestricted testamentary or posthumous disposition.[1]

A reference to the origin of the Hindu joint family and to the history of the various steps by which the modern rules relating to inheritance and succession and to partition and alienation of property among Hindus have been established will show that the right to dispose of property by will is a very considerable departure from the principle underlying the joint Hindu family. "In tracing society" says Mr. Mayne[2] "backwards to its cradle, one of the earliest if not the earliest unit, is the patriarchal family." In India from the patriarchal family, which he describes, with its despotic head claiming to be entitled to take possession of, and appropriate the earnings not only of himself but of his wife and children, emerged the early joint Hindu family presided over by the eldest son, or by one chosen from among the sons of the ancestor, as head of the family, all members originally being equally interested in the property and its administration, and no member being competent to sell or give away any

[1] See *Vallinayagam* v. *Pachche*, 1 Mad., H. C. R., 326.

[2] Hindu Law, § 205.

portion of the family property, except in case of distress or for the performance of religious duties.[1] When the family extended, each member so long as the family kept together naturally regarded himself as having a vested interest in the joint property, and it is not surprising, therefore, to find Hindu lawyers treating the joint family property as a fund for the maintenance of the members of the family. This simple form of the joint family was more adapted to a purely pastoral or agricultural community dependent for the most part on the products of the soil, than to a community which had begun to apply itself to commerce and other modes of industry, and gradually, as the society emerged from its more primitive condition, we find that serious encroachments were made upon it.

In the early stage of Hindu society a right to appropriate what is called self-acquired property did not exist. But "when," as Mr Mayne[2] remarks" the joint family arose, self-acquisition became possible but was gradual in its rise. While the family lived together in a single house supported by the produce of the common land there could be no room for separate acquisition. The labour of all went to the common stock and if one possessed any special aptitude for making clothes or implements of husbandry his skill was exercised for the common benefit and was rewarded by a similar interchange of good offices, or by the improvement of the family property and the increased comfort of the family home. But as civilization advanced and commerce arose new modes of industry were discovered which had no application to the joint property. As the family had only a claim upon its members for their assistance in the cultivation of the land and the ordinary labours of the household they could not compel the exertion of any special forms of skill unless it was to meet with a special reward. It was recognised that a member who chose to abandon his claims upon the family property might do so and thenceforward pursue his own special occupation for his own exclusive profit.[3] But it might be for the advantage of all to keep the specially gifted members in the community by allowing him to retain for himself the fruits of his special industry. On the other hand an injury would be done to the family if while living at its expense he did not contribute his fair share of labour to its support or if he used any appreciable portion of the family property for the purpose of producing that which he afterwards claimed as exclusively his own. The doctrine of self-acquired property sprung from a desire to reconcile these conflicting interests."[4]

The recognition of the title to self-acquired property was the first important step towards the disintegration of the joint family. The essence of the title consists in the property having been acquired by the agency of the individual member without making use of anything which belonged to the family. As the spirit of enterprise arose, men began to engage in industrial pursuits which had

[1] Dig. 455, 2 Dig., 189.

[2] Hindu Law, § 215.

[3] Manu IX, § 207; Yajnavalka II, § 116.

[4] Mayne's Hindu Law, § 215.

no application to the family property, and thus the tie which bound the family, became gradually weaker. Those who were able by their individual exertions to add more rapidly than the other members of the family to the family stock soon sought to secure the fruits of his labours to themselves and their own descendants by separating from his less able or less enterprising coparceners. In this way the right to claim a partition of the family property came to be recognised, and, largely fostered as it seems to have been by the influence of the Brahmins, was finally established on the present basis.

A much wider departure from the original conception of the joint family, than the establishment of the right of partition was the subsequent establishment of the right to dispose of the family property *inter vivos*. That right being established, it was no great step to the assertion and subsequent maintenance of the right to interfere by will with the ordinary devolution property after death.

Although the idea of testation is admittedly contrary to the spirit of the early joint Hindu family, yet we have in the ancient Hindu doctrine of adoption an element which may be viewed as to some extent testamentary in its character. The power or faculty of adoption is an institution by which the ordinary course of descent is interrupted. The husband by giving his wife power to adopt a son after his death clearly gives her power to interfere with the devolution of the family estate by diverting it into a totally different family. But while this is so, it must be borne in mind that the object of the husband in giving his wife a power to adopt is not disruption of the line of descent but, by a fictitious creation of blood relationship, to cause a continuation of the line.

It seems to be taken for granted that the practice amongst Hindus of making wills first originated in the Presidency towns, and from this circumstance many have supposed that the Hindu Will owes its origin to the example of Englishmen or to the influence of European lawyers in the Courts established in India by the English.

When wills first began to be made by Hindus it is impossible to say with certainty. Mr. Mayne says, "there can be no doubt that from the earliest period of our acquaintance with India are to be found traces of a struggling towards testamentary power, often checked but constantly renewed,"[1] and he expresses his opinion that the true origin of the testamentary power is to be sought for in the influence of the Brahmins, who were especially strong in Bengal. The working of this influence is thus described by Mr. Mayne: "The moral law as promulgated by Manu might be described as a law of gifts to Brahmins. Every step of a man's life from his birth to his death required gifts to Brahmins. Every sin which be committed might be expiated by gifts to Brahmins. The huge endowments for religious purposes which are

[1] Mayne's Hindu Law, § 367.

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found in every part of India show that these precepts were not a dead letter. Every day's experience of present Indian life shows the practical belief in the efficacy of such gifts. Naturally every rule of law which threw an impediment in their way would be swept aside as far as possible. And, when we remember that the Brahmin was the King's minister in his Cabinet, the King's judge in his Court, it is obvious that it was a mere question of the means that would be adopted to secure the end. Even the earlier writers had led the way by mingling pious gifts with the necessary purposes which would justify an alienation of family property.[1] It was a further step to emancipate the holder of the estate from all control whatever. This was effected in Bengal by the doctrine that a father was absolute owner of the property and by its further extension that every collateral member held his share as tenant in common and not as joint tenant. The favour shown to women, who were always the pets of priesthood, by allowing them to inherit and to enforce partition in an undivided family seems to me an additional stage in the same direction. The validity attributed to deathbed gifts for religious objects which gradually ripened into a complete system of devise completed the downfall of the Common Law of property in India."[2]

"It is obvious" Mr. Mayne in another passage[3] says "a man is never more disposed to pious generosity than in his last days when the approach of death furnishes him with the strongest motives for investing in the next world that wealth which he can no longer enjoy in the present. The acuteness of the Brahmin would have readily discovered and utilized this fact." The same learned author goes on to draw attention to the remarkable fact, which had already been pointed out by Sir Thomas Strange in 1812 as to wills made by Hindus in Madras, that in the earliest wills of which we have any knowledge, enormous sums are bestowed for religious or superstitious purposes.

Whether or not we are to look to the influence exercised by the Brahmins for the actual origin of Hindu wills, as suggested by Mr. Mayne, there can be no doubt that the struggle for testamentary power received very considerable support from the Brahmins.

Although it may be that the example and influence of Englishmen and Western lawyers have done much to hasten the growth of the Hindu will, it is perhaps too much to say that to these circumstances the Hindu will owes its origin. So far as the Courts are concerned it must be borne in mind that Hindus were not subject to the jurisdiction of the Mayor's Courts which were established at Fort William, Madras and Bombay in 1726 and again re-established in 1753, with some alterations. The Mayor's Court at Fort William was in 1774 succeeded by the Supreme Court. At Madras and Bombay the Mayor's Courts

[1] 2 Dig. 96, Mitak., 1, § 28, Daya Bhaga, XI, 1, § 63.

[2] Mayne's Hindu Law, § 238.

[3] Ibid, 368.

existed till 1797 when they were abolished and Recorder's Courts established in their place under 37 Geo. III, c. 142. The Recorder's Courts in Madras and Bombay were respectively abolished in 1800[1] and 1823[2] to make way for the establishment there of the Supreme Courts. It was indeed the practice in the Mayor's Courts to grant probates of Hindu wills, but the practice was far from uniform. In *Bibee Muttra's* case[3] which was decided in 1832, a question arose as to whether the Supreme Court at Fort William had jurisdiction to grant probate of the wills of Hindus, and an enquiry was instituted as to what the previous practice had been. The result of that enquiry is instructive as it indirectly gives some idea as to what extent at that time the custom among Hindus of making wills had grown.

It appeared that, at Fort William, from 1775, or from the time of the establishment of the Supreme Court to 1782 about 200 probates of the wills of Hindus and Mahomedans had been granted, but from 1782 to 1804 there had been a total cessation. From 1804 to 1816 only six were granted but from the latter date to 1832 about 230 probates and administrations had been issued.

At Madras, it appeared that in the Mayor's Court a practice of granting probate in respect of the Wills of Hindus had sprung up and was followed in the Recorder's Court,[4] but the practice ceased after the establishment of the Supreme Court and was not revived till shortly before 1812.[5] In Sir Thomas Strange's Hindu Law, published in 1830, Vol. II, 417—427 the opinions of the Pundits of Bellary, Madras, Mussulipatan, Chittoan, Chingleput and Vizagapatam are given each upon a different case. In each case the power of a Hindu to make a will seems to have been admitted or assumed so far at least as it might not be contrary to the shasters.

In Bombay, the practice apparently underwent the same vicissitudes as in Bengal.[6]

In 1775, Hyde, J., doubted whether the ecclesiastical jurisdiction could extend to any but Christians. In 1776, Impey, C. J. and Chambers, J. in the case of *Ex parte Commula*,[7] doubted, and took time to consider, whether administration of the goods of a Hindu could ever be granted, but they afterwards decided that administration should be granted, but that the administrator should be bound to administer according to the Hindu customs. In 1778, Impey, C. J. said. "I was at first against granting any administrations to Hindus thinking it would

[1] Geo. III, 79.
[2] 4 Geo. IV, c. 71.
[3] Morton's Rep. by Montriou, p. 191.
[4] 1 Str., p. 267.
[5] 2 Str., p. 267; *Chellammal* v. *Garrow*, 2 Str. Notes of Cases, p 1.
[6] See *In the goods of Bebee Muttra*, Morton's Reports by Montriou, p. 193.
[7] Morton's Rep. by Montriou, p. 1.

create confusion * * I acceded to the opinions of others of the Judges (Lemaistre and Hyde, JJ.) and agreed that administration might be granted to Hindus under the description of British subjects."[1]

In 1791 the Court, which consisted of Chambers, C. J., Hyde and Dunkin, JJ., unanimously refused to grant probate of the Will of a Mahomedan observing that since Stat. 21, Gee. III, c. 70 nad arrived in the country it had been resolved that the statute was a prohibition against granting probate of the Wills of Hindus or Mahomedans, and that since that time it had never been done.[2]

It was not till 1832 that the practice at Fort William was finally settled. In that year the Court (Russell, C. J. and Franks J., and Ryan, J., dissenting) held that it had power to grant probate in respect of the Wills of Hindus[3] and from that time probates of such Wills were constantly granted.

If we are to judge by the manner in which the Courts up to comparatively recent times dealt with the wills of Hindus which came before them, we shall certainly not be justified in saying that in the making of wills much direct encouragement was given to Hindus by the Courts. So far as the Supreme Courts are concerned we must bear in mind that on all questions of Hindu law the Judges professed to follow the opinions of the Pundits attached to their Courts whom they were bound by law to consult, and of the Judges of the Sudder Court. This circumstance, taken with the fact that in Bengal from 1791 to 1832 the Courts actually refused to admit the wills of Hindus to probate, and that in the other presidencies, there was also a period when the practice of granting probate was suspended, is against the view that the growth of the Hindu will owed much to the judges of the influence of the Supreme Court, or of the English lawyers practising before them. Be they as it may, Hindus in the Presidency towns have had, for upwards of a century at least, and it may be for a much longer period, an opportunity of being more or less familiar with the ideas and forms of English testamentary dispositions. That they have borrowed much of the technical legal language and forms peculiar to English wills and English dispositions of property is evidenced by many of the earlier wills of which a record has been preserved, and it is impossible to say that they may not also have absorbed some of the ideas and modes of testation imported from England by the British settler.[4] It may be also that as the Hindus undoubtedly in later times borrowed much of the language and forms from the English settler, they had already imi-

[1] *In the goods of Bindebund Gossain*, Morton, p. 3. Under the Royal Charter granted in 1726, all the common law and statute law at that time extant in England was introduced into the Indian Presidencies—See Morley's Administration of Justice, p. 7; Clarke's Rules and Orders of the Supreme Court, Pref. p. 4.

[2] *In the goods of Hadjee Mustapha*, Morton, p. 74.

[3] *In the goods of Bebee Muttra*, Morton's Rep. by Montrion, p. 191.

[4] See Montrion's Hindu Will, p. xlviii.

tated their Mahomedan brethren in the matter of making wills, and that wills were not unknown to them long previous to the advent of the English.

In the case of *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*,[1] Markby, J., in 1868, collected the reported cases as to wills or so-called wills in Bengal, and, from the number of such cases which he was able to find, he concluded that up to that time the cases of genuine wills outside Calcutta were extremely rare. He seems, however, to have considerably underestimated the amount of litigation which had taken place in respect of the wills of Hindus. As to the wills of Hindus in Calcutta itself, he was of opinion that such wills in any but the simplest form, were of undoubtedly English origin, in the sense that the Hindus in Calcutta had learned from the English the habit of making wills. It cannot be denied by any one who has practised as a lawyer, or had to administer the law, in the Presidency towns, that Hindus in the making of wills have, as I have already stated, learned much from the example of Englishmen, but I do not understand Markby, J. to mean that the real origin of the Hindu will is necessarily traceable to the example of Europeans He says: "The usage (of making wills) in Calcutta is not a Hindu usage but an English usage adopted by Hindus. Not that even in Calcutta, have I any reason to suppose, that such wills as are now under consideration are common. I believe that they are of very recent origin and probably owe their existence to some discussions which have taken place in this Court and in the Privy Council which have been misunderstood. That they will become common if the testamentary capacity is affirmed to that extent I think not unlikely." That in 1868 it should have been found that Hindu wills were still rare, or that the more complicated Hindu wills showed evident signs of having borrowed English forms or usages, does not greatly assist the solution of the question of the origin of Hindu wills. In the opinion of Mr. Justice A. G. Macpherson the custom of making wills prevailed among Hindus quite independently of any decisions of the Courts, or any intervention of English lawyers.[2] It appears too that Hindu wills were recognised at Pondicherry by the French from the commencement of French rule in that settlement.[3]

The earliest known existing Hindu will is that of one Omichand. It is dated 1758.[4] The first reported case in which a Hindu will was recognised by the English Courts was that of *Munnoolall* v. *Gopee Dutt*[5] decided in 1786. The next case is that *Russick Lall Dutt* v. *Choitan Churn Dutt*.[6] decided in 1789. In

[1] 2 B. L. R., (O. C. J.), 11.

[2] *Krishnaramani Dasi* v. *Ananda Krishna Bose*, 4 B. L. R., O. C. p 288.

[3] Montriou's Hindu Will, lv.

[4] The Will is set out in Montriou's Hindu Will, p. 9.

[5] Montriou, H. L. Cas., p. 290.

[6] Montriou, H. L. Cas., p. 304.

that case the testator, who was possessed of both ancestral and self-acquired property, devised the whole of his property to his two younger sons to the exclusion of the two elder sons, one of whom contested the will, which was, however, after reference to the pundits, declared to be valid. The case of the Nadiya Rajah which was decided in 1792[1] has been treated by Mr. Colebroke and others as an authority that a Hindu father has power to make an actual disposition of property by will, even contrary to the injunctions of the law, but the instrument which the Court had to consider in that case was not a will but a deed of gift accompanied by actual delivery of possession. This appears to be clear from the document itself and by the steps taken by the Rajah to give it full effect.[2] The next cases were those of *Dial Chund Addie* v. *Kissory Dassee*[3] and *Gope Mohun Deb* v. *Sree Rajcristna Deb*[4] decided in 1791 and 1800 respectively. In the latter case the testator, who had a natural born son and an adopted son adopted before the birth of the other, bequeathed an ancestral taluq to the adopted son and his four brothers, thus excluding his natural born son from all interest. His right to do so was not questioned by either party to the suit. The decree therefore recognised the right of a Hindu to dispose by will of all manner of property.[5] In 1808 the will of Nemy Churn Mullick was contested in the Supreme Court and the decree "declared that by the Hindu Law Nemy Churn Mullick deceased might and could dispose by will of all his property as well moveable as immoveable and as well ancestral as otherwise."[6] There was an appeal to the King in Council and the decree was affirmed, the validity of the will not being, however, questioned on the appeal.[7] The brother of Nemy Churn Mullick died possessed of a very large property, ancestral and self-acquired, immoveable and moveable, and although he left a will by which he almost completely disinherited his son, the case was not brought into Court, the disinherited son apparently being satisfied that any attempt to act aside his father's will, must fail.[8]

In 1809 two cases were heard by the Supreme Court in which the wills of Sobarun Bysack and Mudun Mohun Bysack were contested[9] and after a protracted litigation a final decree was made by the Privy Council in 1825.

[1] *Eshanchund Rai* v. *Esharchund Rai*, 1 Select Rep. 2.

[2] See Siromani's Commentary on Hindu Law, pp. 198, 199.

[3] Montriou, H. L. Cases, p. 371.

[4] Ibid, p. 381.

[5] See F. Macn., 356, 7.

[6] F. Macn., p. 340; Montriou's Hindu Will, p. 83. See *Sreenarain* v. *Lullutnarain Rai*, 2 Select Rep., p. 29.

[7] 1 Knapp. 145. See Montriou's H. L. Cases, p. 476.

[8] F. Macn., p. 350. The will is set out in Montriou's Hindu Will, p. 112.

[9] The wills are set out in Montriou's Hindu Will, pp. 92—97.

The main question on appeal was as to the extent of power or control of a Hindu widow over the moveable or immoveable property of her deceased husband.[1]

In 1812, in a case referred by the Sudder Court of Bengal, the pundits, who were consulted, gave their opinion that although there were no texts in which the case of a bequest was expressly meritorious, yet the same rule applied to bequests as to gifts, and that every person who had authority while in health to transfer property to another had the same authority to bequeath it.[2]

Finally, in 1831, upon a reference made by the Judges of the Supreme Court who had differed in opinion, the Sudder Court returned a certificate in which they said that in the province of Bengal a Hindu who has sons, can without the consent of his sons "by will prevent, alter or affect their succession to such (immoveable ancestral) property."[3] From that time it may be taken as beyond dispute that in Bengal a man who is absolute owner of property might dispose of it by will as he pleased, whether it were ancestral or not.[4]

I have already referred to Regulations XI of 1793, XXXVII of 1793 and V of 1799 to show that the existence of wills of Hindus had long been recognised in Bengal by the legislature.[5]

In the Madras Presidency the validity of Hindu wills was not fully recognised till somewhat later. The first reported case in Madras appears to be that of *Verapermall Pillay* v. *Narrain Pillay*, decided in 1801 in the Recorder's Court,[6] but there the question as to the competency of a Hindu to make a testamentary disposition of his property was not touched upon at the hearing, the will in that case being treated by all parties for the purposes of the suit as a direction in writing to adopt. Sir Thomas Strange, who was then Recorder, speaks of a disposition by will as being unknown to the Hindu, and not to be defended in the Courts. We have seen, however, that in the Mayor's Court and afterwards in the Recorder's Court a practice, as in Bengal, had already sprung up of granting probates of will in case of Hindus, but that this practice was discontinued by the Supreme Court.[7] In 1812 the question as to the validity of a will by a Hindu was raised in an equity suit. The Court doubted whether a Hindu could make a will at all, but was of opinion that he could not do so in the case of undivided property. The bill was accordingly dismissed, but a re-hearing was afterwards allowed in order to see whether it might not be sustainable to the extent of the testator's share, or with regard to such portion of it as had been acquired

[1] Montriou's Hindu Will, p. 104.

[2] *Sreenarain Rai* v. *Bhya Jha*, 2 Select Rep., New Edn. 29, p. 37.

[3] *Doe D. Juggomohun Roy* v. *S. M. Neemoo Dossee*, Morton's Decisions, p. 90.

[4] *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty*, 6 M. I. A., p. 341 per Lord Kingsdown.

[5] See *supra*, pp. 7—9.

[6] Mad. Notes of cases, p. 78.

[7] 1 Str. H. L., 267.

by himself, but the opinion of the Court was not finally taken upon that more restricted view of the subject.[1]

While Sir Thomas Strange sat in the Supreme Court, he has told us, the validity of a Hindu will in Madras had not been decided in that Court,[2] but shortly after his retirement a case occurred in which a will in respect of self-acquired property was held to be valid.[3] In upholding the particular bequests in the will the Court appeared to have proceeded by analogy to what they considered to be the Hindu law regulating gifts *inter vivos*. Since that case it does not appear to have been doubted that a Hindu in the Madras Presidency might dispose of property by will.[4] It was apparently the only case in the Supreme Court upon the question of the extent to which the power of the disposal by will could be exercised.[5] The question, however, was considered from time to time in the Sudder Court. In a case referred to in the report of the case of *Vallinayagam* v. *Pachche* as having been instituted in 1823[6] it was held, with respect to ancestral property, that a Hindu was not competent to dispose of the whole of such property so as to deprive an elder brother of his regular legal succession, and in another case, instituted in the following year and referred to in the same report, the Court expressed an opinion that a man is authorized to dispose of no property by will, which under the same law he could not have alienated during his lifetime by any other instrument. In no case, however, before the Sudder Court was the question of the extent of validity of Hindu wills actually determined.

In 1829, Regulation V (Mad.) of that year was passed repealing s. XVI, cl. 2 of Regulation III of 1802 so far as it applied to Hindus.[7] It recited that wills are instruments unknown and have been made so as to be repugnant to the Hindu law, according to the authorities within the several provinces of the Madras Government, and by s. 4 it directed that wills left by Hindus should have no legal force whatever, except so far as their contents might be in conformity with the provisions of the Hindu Law according to the authorities prevalent in the respective provinces in the Madras Presidency. The Court seems to have considered that the effect of the Regulation was to make wills wholly inoperative, for in a case[8] referred to in argument before the Privy

[1] 1 Str. 267-8. See 2 Str. 417—225, 425, 437, 439, 441, 452.

[2] 1 Str 268.

[3] See *P. Narainswami Chetti* v. *P. Aruna Chella Chetti*, 1 Mad. H. C. R., p. 336; 1 Str., 268.

[4] See *Vellinayagam* v. *Pachche*, 1 Mad. H. C. R, p. 336.

[5] Ibid.

[6] Ibid, p. 336.

[7] See *supra*, p 9.

[8] Decisions, Sudder Adalat, Mad, p. 27.

Council in the case of *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty*[1] it was held that a will devising ancestral property was a nullity.

The case of *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty* was decided by the Sudder Court in 1851. There too it was argued before the Sudder Court that the effect of Reg. V of 1829 was to make the will and codicil altogether void. The suit was by the widow to recover her husband's estate which was both ancestral and self-acquired. She claimed it as heir upon the ground, amongst others, that her late husband was wholely incompetent to dispose of the property by will. The defendants insisted that the widow's title as heir-at-law was displaced by the will and codicil by which they had been appointed executors and managers. The will after making provision for the maintenance and residence of the testator's wife and daughters and certain other female relatives and giving certain bequests, gave the rest of the property to various religious and charitable institutions. It also provided that if the wife, who was then pregnant, were delivered of a son, the estate should revert to him on his coming of age, but if a daughter were born, the same provision was to be made for her as for his other daughters. The testator had left no male issue, and his widow was delivered of a girl. The will was found to have been duly executed, but the widow set up a verbal power from her husband to adopt a son, of which, however, no mention was made either in the will or codicil.

Before finally deciding the suit the Judges consulted the pundits of the Sudder Court as to whether the will was valid, and 2ndly, whether assuming that the deceased had given his wife verbal instructions to adopt a son in the event of her bearing a daughter, her compliance with the instructions would operate to invalidate the will. The following answer was given by the pundits: "The will referred to in the question is valid under Hindu Law, the testator having thereby bequeathed a portion of his estate for the maintenance of his wife and other members of his family whom he was bound to protect, and directed the remainder to be appropriated to charitable purposes in the event of his wife who was then pregnant not being delivered of a son. If the testator had really given his wife verbal instructions to adopt a son in the event of her not bearing male issue her compliance with those instructions would invalidate the will according to Hindu Law, it being incompetent for the testator, who authorized the adoption of a son, to alienate the whole of his estate and thereby injure the means of maintenance of his would-be heir." The Chief Judge found against the power of adoption and decided in favour of the will. On appeal the Sudder Court affirmed his decision. In their judgment they say: "The Court have referred to all the authorities quoted by the appellant in support of this position (that the will was illegal because the widow was the person to whom the law gives the estate) and found that although the opinions regarding wills of

[1] 6 M. I. A., p. 336.

Hindus generally are conflicting, yet the majority of them are against the argument of the appellant. It is unnecessary to cite all the opinions given on the subject, and the Court will content itself by referring to the case of *Ramtoonoo Mullick* v. *Ramgopal Mullick* (1 Morley's Dig., p. 39, No. 3) in which it was held that a Hindu might and could dispose by will of all his property, moveable and immoveable, and as well ancestral as otherwise, and this decision was affirmed on appeal by the Privy Council.

"Questions, however, regarding the legality of the will now under discussion were referred to the law officers of the Court to whom the legislature have assigned the duty of declaring the law in such matters, and they distinctly stated their opinion that it is a valid and good instrument. The argument therefore of the appellant that it is not recognizable under the provisions of Reg. V of 1829 cannot be sustained."

The case was afterwards fully argued before the Privy Council and the decision of the Sudder Court was affirmed. The Privy Council, however, did not express any opinion upon the general question as to the right to dispose by will being co-extensive with the right of disposal by act *inter vivos*. In their judgment their Lordships said[1]:—"It must be allowed that in the ancient Hindu law, as it was understood through the whole of Hindostan, testamentary instruments, in the sense affixed by English lawyers to that expression, were unknown; and it is stated by a writer of authority (Sir Thomas Strange) that the Hindu language has no terms to express what we mean by a will. But it does not necessarily follow, that what in effect, though not in form, are testamentary instruments, which are only to come into operation and affect property after the death of the maker of the instrument, were equally unknown. However this may be, the strictness of the ancient law has long since been relaxed, and throughout Bengal a man who is the absolute owner of property may now dispose of it by will as he pleases, whether it be ancestral or not. This point was resolved several years ago by the concurrence of all the Judicial authorities in Calcutta, as well of the Supreme as of the Sudder Court[2] No doubt the law of Madras differs in some respects, and amongst others, with respect to wills, from that of Bengal. But even in Madras it is settled that a will of property, not ancestral, may be good; a decision to this effect has been recognised and acted upon by the Judicial Committee,[3] and indeed, the rule of law to that extent is not disputed in this case.

If, then, the will does not affect ancestral property, it must be, not because an owner of property by the Madras law cannot make a will, but because by

[1] *Nagalatchmee Ummal* v. *Gopoo Nadraja Chetty*, 6 Moore, I. A., pp. 344—346.

[2] See *Juggomohun Roy* v. *S. M. Nemoo Dossee*, Morton, 90.

[3] *Mulraz* v. *Chalekany*, 2 Moore's, I. A., 54.

some peculiarity of ancestral property, it is withdrawn from the testamentary power.

It was very ingeniously argued by the respondents' Counsel, that in all cases where a man is able to dispose of his property by act *inter vivos*, he may do so by will; that he cannot do so when he has a son, because the son, immediately on his birth, becomes coparcener with the father; that the objection to bequeathing ancestral property is founded on the Hindu notion of an undivided family; but that when there are no males in the family, the liberty of bequeathing is unlimited.

It is not necessary for their Lordships to lay down so broad a proposition; they think it safer to confine themselves to the particular case before them. Under the circumstances of the testator's family, when he made his will and codicil, and having regard to the instruments themselves, the Pundits, to whom this question was properly referred by the Court—the Pundits of the Sudder Dewawny Adawlut, have declared their opinion, that these instruments are sufficient to dispose of ancestral estate; that opinion has been affirmed by two Judges successively, of whom it is but justice to say that they appear to have examined the subject very carefully, and, after much consideration, to have pronounced very satisfactory judgments, though in one or two incidental observations which have fallen from them, their Lordships may not entirely concur."

In the case of *Vallinayagam Pillai* v. *Pachche*[1] which was decided in 1863 by the Supreme Court at Madras all the previous authorities were discussed. From the judgment it would appear that the Sudder Court in more than one case refused to follow not only their own decision in 1851 in the case of *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetti*, but the decision of the Privy Council in 1856 affirming it. In one of the cases decided in 1861, which was said to be exactly similar to that of *Nagalutchmee* v. *Gopoo Nadaraja Chetti*[2] it appeared that their sole ground was the retractation by the pundits of their former opinion. The following is reported to have been their judgment. "We reject this appeal. The Privy Council go wholly upon the opinion of the pundits which they (the pundits) have since retracted on the difference being pointed out to them between alienation in the party's lifetime and testamentary disposition by will to take effect after death." In the case, however, of *Vallinayagam Pillai* v. *Pachche*[3] the Court again established the right of a Hindu according to the Hindu Law prevailing in Madras to make a will disposing of his property after death, whether the property be ancestral or self-acquired, and the power, it was of opinion, was co-extensive with the independent right of alienation *inter vivos*. "It is not necessary" said Scotlend, C. J. by whom the judgment of the Court was delivered "for us to

[1] 1 Mad., H. C. R., p. 326.

[2] 1 Mad., H. C. R., 326.

[3] See the note of the case at p. 33.

consider and lay down any general rule as to how far, or under what circumstances the law gives to a Hindu the power of disposal by will. But we may observe that now that the legal right to make a will is settled, there seems to be nothing in principle or reason opposed to the exercise of the power being allowed co-extensively (as stated in some cases and forcibly urged in *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetti*) with the independent right of gift or other disposal by act *inter vivos* which, by law or established usage or custom having the force of law, a Hindu now possesses in Madras. To this extent the power of disposition, can reasonably be considered to be in conformity with the respective proprietary rights of the possessors of property and of heirs and coparceners as provided and secured by the provisions of the Hindu law."

As to the Bombay Presidency it is more difficult to say when testamentary power was first judicially recognised. Sir Thomas Strange in his treatise on Hindu Law, published in 1830, set out an opinion of a pundit of the Recorder's Court at Bombay with reference to the competency of a Hindu to dispose of the property by will in case of either undivided or divided property. The pundit's answer was as follows: "There is no mention of wills in our shasters: therefore they ought not to be made. If it be said that it is lawful for a father to divide his property during his life, that is true: but then it cannot be agreeably to the shasti: he cannot divide it according to his pleasure; and if he does his partition will be liable to be corrected: so that the shaster is the only rule. An undivided family having no power individually but collectively, no member can, without the concurrence of all, express or implied, dispose of anything. Where a division has taken place, and the family of the individual is sufficiently provided for, an alienation is competent, but not even then of the immoveable property. The deceased member of an undivided family having no son, his share of the joint property does not descend to his widow, but survives to the brothers or other co-heirs. Thus I have written what is the practice of the country."[1] In 1808 in the case of *Deo Bae* v *Wun Bai*[2] the shastrees declared a will by which the testator devised away his property to the exclusion of his wife and daughters, except for maintenance, to be invalid. In the following year the Court considered a will by which the testatrix made over property to a total stranger to be contrary to the shasters and therefore illegal.[3]

In 1816 where a widow sought to recover her late husband's property, the widow and son of her late husband's brother set up a will in favour of the nephew, but charged with the maintenance of the plaintiff. On the

[1] 2 Str. 449. That wills are to be found in the records of the Bombay Zillah Courts between 1808 and 1820 appears from numerous cases in Borrodaile's reports.

[2] 1 Borr. 26.

[3] *Chooneelal* v. *Jussoo Mull Deveedas*, 1 Borr., 60. See *Dhoolubh Bhaee* v. *Jeevee*, *Ibid*, p. 75.

plaintiff's behalf it was urged that no one was entitled to the property but herself during her life, her husband and his brother being separate. The pundits being consulted by the Zillah Judge as to the effect of such a will upon the right of the widow, assuming there had been the alleged separation, answered that the will was not valid.[1] The pundits, in another case in 1810, had been consulted as to the validity of a will by which the testator, who left a widow as his sole heir, assigned a sum for defraying his obsequies, and the effect of their answer, which was rather obscure, was, that the rights of the lawful heir might be affirmed, but could not be set aside by a will.[2] In 1819 the Sudder Court affirmed the decision of the lower Court which had held that under Hindu law the consent of an heir to the willing away of property was necessary.[3]

In the case of *Narottam Jugjivan* v. *Narsandas Harikisandas*[4] the District Judge had held that a Hindu in the mofussil could not dispose of his property, and this apparently whether it was self-acquired or otherwise. On appeal to the High Court at Bombay, Westropp, J. stated what had been the practice of the Supreme Court and of the High Court on its Original Side as to the recognition of wills in the Bombay Presidency. He said: "In the Supreme Court, where the right of a Hindu to make a will has been always recognised, I have never known it to be argued or held, that his testamentary power is co-extensive with that of an Englishman. The will of a Hindu, it has been decided by the Privy Council, must be regulated by the Hindu Law.[5] It has been often ruled in the Supreme Court, that he may dispose, by will, of property wholly acquired by his own exertions, and also of separate property acquired by partition of family property, or by the non-existence, or if any did ever exist, the extinction of co-parceners, (if the members of an undiveded Hindu family may be so designated,) or joint tenants; and no distinction, of which I am aware, has ever been there taken between it and self-acquired property, either in point of descent or of alienability. On the other hand, it has been often held there, also, that he cannot dispose, by will of undivided family property, or any share therein, so long as that share remains unsevered from the family stock."

The case from the judgment in which I have just quoted was decided in 1866.

In Burmah, the instances in which Burmans have made wills are not

[1] *Goolab* v. *Phool*, 1 Borr, 173.

[2] *Gungaram Wiswunath* v. *Tappee Baee*, 1 Borr, 412.

[3] *Hureewulubh Gungaram* v. *Keshowram Sheowdas*, 2 Borr., 7. See *Man Baee* v. *Krishna Baee*, 2 Borr. 141.

[4] 3 Bom. H. C. R., A. C. 6.

[5] See 8 Moo. I. A. 66.

numerous, and it is at least doubtful whether such wills are valid.[1] In the statement of Objects and Reasons to the Testamentary Bill, which was introduced in 1881 and to which reference has already been made, it was said that the local Government had remarked that "the Burmese of the larger towns are in the habit of making wills. They are very ready to adopt the practices of advanced civilisation where they recognise their advantages, and they are quick to discover the merits of any particular custom. In the course of the rapid progress which their country is making, they have easily perceived the benefits of a power of regulating the devolution of property by will, and a genuine want for this power has in consequence grown up." But it was also stated that the Recorder of Rangoon and the Judicial Commissioner sitting together as a Special Court had decided that a Buddhist had no power to make a will.

In 1882 the local Government, in forwarding the opinions upon the Bill which had been collected in Burmah, remarked that, although the views set forth were diverse and conflicting, "on the whole the Chief Commissioner gathers that there is a strong and general opinion against any considerable extension of the power of testamentary disposition." In a note dated the 30th Nov. 1881, Mr. Egerton Allen, the then Government Advocate, endeavoured to trace the history of wills in British Burma. He stated that the earliest Buddhist will of which probate had been granted was made in 1864; that in 1865 the then Chief Commissioner, on being asked his opinion as to the expediency of extending to Buddhists such part of the Indian Succession Act as relates to testamentary succession, had stated that he considered that no part of that Act should be extended to Burmese Buddhists, as the Buddhist law did not allow the making of any will, the terms of which might be at variance with the law of inheritance; that between the years 1868 and 1875 a power of testation seemed to have been exercised by Burmese Buddhists with the approbation of the Courts, as appears from the fact that probate was granted of their wills, the only question raised being by what Courts, and under what law, probate should be granted. He referred to the cases of *Kokya Dyne*[2] and *In the goods of Fakerooddeen Adam Shaw*.[3] The latter case decided that District Judges had the power to grant probate.

He went on to state that in 1875 the then Judicial Commissioner had in the case of *Nga Tsan Yoon* v. *Nga Myat Thin*[4] doubted the power of a Buddhist to make a will which would cause the devolution of property contrary to the law of inheritance, and in the same year the officiating Judicial Commissioner upheld the finding of a lower Court that a Burmese women had no power to dispose of property by will as she pleased;[5] that in 1878 the Special Court

[1] See pp. 6, 7, *supra*.

[2] 2 B. L. R. Ap. 79.

[3] 11 W. R, 413.

[4] Sandford's Rulings, p. 45.

[5] *Ma Thee* v. *Ma Noo*, Christopher's Rulings, p. 91.

decided that probate of a Buddhist will might be granted by the Recorder's Court but not by a District Court, thereby recognising by implication, as the point was not actually raised, that a Burmese Buddhist had some power of testation:[1] that in June 1880 the special Court held that a Buddhist could not dispose of his property by will.[2]

The Hindu Wills Act applies to Buddhists within certain territories only, but s. 155 of the Probate and Administration Act, V of 1881 which enacts that "all grants of probate of the will or letters of administration to the estate of any deceased Hindu, Mahomedan or Buddhist, or any person exempted under s. 332 of the Indian Succession Act 1865 which before this Act comes into force, have been made in British Burma,[3] shall, whenever such grant would have been lawful if this Act had been in force, be deemed to have been made in accordance with law," was intended to remove all doubt as to the validity of grants of probate and administration made in British Burmah.[4]

The earliest reported cases in which it was held that Hindus in the North-Western Provinces had power to make testamentary dispositions in the nature of wills were decided, as we have seen, by the Privy Council in 1846 and 1862 respectively.[5]

I have already referred to the recognition by the Courts of the wills of Hindus in the the Punjab and Oudh.[6]

In 1862, the Judicial Committee of the Privy Council in speaking of the practice of making wills among the Hindus in India, declared generally that it might be taken that, whatever might have previously been considered the state of Hindu law as to the testamentary power over their property, it had been long recognised and must now be considered as completely established.[7]

[1] *Moung Hpo Khin* v. *Makyin*, Christopher's Rulings, p. 118.

[2] *Ma Bwin* v. *Ma Yin*, Christopher's Rulings, p. 155.

[3] See Act XX of 1886.

[4] See Statement of Objects and Reasons, dated the 16th May, 1879.

[5] *Rewun Persad* v. *Radha Beeby*, 4 M. I. A., 137; *Nana Narain Rao* v. *Hurree Punth Bhao*, 9 M., J. A., 96.

[6] See p. 9, *supra*.

[7] See *Sooryeemoney Dassee* v. *Denobundhoo Mullick*, 9 M. I. A., 123. p. 135.

LECTURE III.

TESTAMENTARY POWER AMONG HINDUS.

Extent of testamentary power—Property which may be devised in Bengal—in Madras—under Mitakshara—Course of decisions on the subject in Madras—Bombay decisions—Testamentary powers of females—*Stridhan*—Statutory powers of devise—Rights of son in womb—Result of cases as to property which may be devised—Limits of testamentary power of Hindus—History of cases on the subject—Whether regulated by policy of law—Limited only by Hindu Law—*Goberdhun Bysack* v. *Shamchand Bysack*—Law of wills virtually law of Succession—Executory bequests—*Tagore* v. *Tagore*—Questions raised in that case—Decision upon the questions raised—Estates which may be created—Estates tail—Persons capable of taking under a devise—Importance of Tagore case—Recognition of trusts by Hindu law—Perpetuities—Exception to rule as to perpetuities—Gifts in favour of idols and religious endowments—Colourable dedications in favour of idols—Trusts in favour of idols—Trusts for maintenance—Trusts for accumulation—Repugnant conditions—Restraint on alienation—Devise to persons unborn—Wills of Hindu females—Testamentary power of Hindu widow over accumulations of husband's estate—Hindu law, no formalities required under—Minor incapable of making will—Nuncupative wills under Hindu law—Signature or attestation not necessary under Hindu law—Revocation under Hindu law—Principles of construction applied to Hindu wills—Powers of executors under Hindu law.

The power to make a testamentary disposition having been settled in the manner described in the last Lecture it remains to discuss the question as to the extent to which that power has been held by the Courts to be sanctioned by the Hindu law applicable in different parts of India. This question may be divided into two branches, 1stly, as to the nature of the property which may be dealt with, and 2ndly, as to the limits placed upon the disposing power in respect of the persons to whom property may be given, and in respect of the estates which may be created.

According to the Bengal School of law there is no distinction as to the right of alienation by sale, gift, will or otherwise between ancestral and self-acquired property,[1] whether moveable or immoveable.[2] Upon this point Lord Kingsdown speaking in 1856 said: "The strictness of the ancient law has long been relaxed and throughout Bengal a man who is the absolute owner of property may now dispose of it by will as he pleases whether it be ancestral or not. This point was resolved several years ago by the concurrence of all the Judicial authorities in Calcutta, as well of the Supreme Court.[3] No doubt the

[1] See *Tagore* v. *Tagore*, 4 B. L. R. O. C. p. 159, *Ibid.* 9 B. L. R. 396, Per Willes, J.

[2] *Ramtonoo Mullick* v. *Ramgopal Mullick*, 1 Kn. 245, Montr. H. L. Cases, 140.

[3] See *Jugyomohon Roy* v. *S. M. Neemoo Dossee*, Morton's Rep. 90.

law of Madras differs in some respects, and amongst others, with respect to wills, from that of Bengal. But even in Madras it is settled that a will of property not ancestral may be good. A decision to this effect has been recognised and acted upon by the Judicial Committee[1] and indeed the rule of law to that extent is not disputed in this case.[2]

Under the Mitakshara school of law there is a difference between the power of alienation *inter vivos* in respect of property which is self-acquired and in respect of ancestral or joint property. According to the rules prevailing in that school so long as the family remains joint and separation has not been effected either by partition or by agreement, every son who is born becomes upon his birth entitled to an interest in the undivided ancestral property, and no sharer, whether father or son can before partition, without the assent of all the co-sharers, determine the joint character of the property by alienating his share.[3] It follows, therefore, that so long as the family remains undivided no member can make a valid testamentary disposition, under Mitakshara law, of any portion of the joint property to take effect after his death.[4]

In the case of *Nagalutchmee Ummal* v. *Gopoo Naderaja Chetty*,[5] which was decided in 1856 by the Privy Council on appeal from the Madras Sudder Court, the testator by his will purported to dispose of both moveable and immoveable property which was partly acquired and partly ancestral. After pointing out that throughout Bengal a man, who was absolute owner of property whether ancestral or not, might dispose of it as he pleased by will, Lord Kingsdown stated that it had already been laid down as a rule of law that in Madras a will in respect of property, which may not be ancestral, was good. With regard to ancestral property, he said that if such property could not be disposed of by will it would be because by some peculiarity of ancestral property it was withdrawn from the testamentary power. It had been argued that in all cases where a man is able to dispose of his property by act *inter vivos* he might do so by will; that he could not do so when he has a son, because the son immediately on his birth becomes coparcener with his father; that the objection to bequeathing ancestral property was founded in the Hindu notion of an undivided family, but that when there were no males in the family the liberty of bequeathing was unlimited. The Judicial Committee, however, declined to lay down propositions so broad, but, having regard to the circumstances that the testator in the particular case before them died without male issue, kinsman or copar-

[1] *Mulraz Lachmia* v. *Chalekany*, 2 Moore I. A. 54.

[2] *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty*, 6 M. I. A. p. 344. See *Tagore* v. *Tagore*, 9 B. L. R. p. 396, per Willes, J.

[3] See *Sadabart Sahu* v. *Foolbash Kooer*, 3 B. L. R., F. B., p. 44.

[4] See *Sadanund* v. *Bonomalee*, 1 Marsh. 317, p. 520.

[5] 6 M. I. A. 309, p. 345.

cener, and that he had made provision for the maintenance of the female relations, they held that under the law prevailing in Madras, the will was valid in respect of ancestral as well as of acquired estate. It appears, therefore, that the Judicial Committee disposed of the appeal without expressing any opinion upon the general question as to the right of disposition by will being co-extensive with the right of disposal by act *inter vivos*. This question was raised and discussed at considerable length by the Madras High Court in 1863, in the case of *Vallinayagam Pillai* v. *Pachche*.[1] In the meantime, however, the Madras Sudder Court seems to have disregarded its own decision which was affirmed in the case of *Nagalitchmee Ummal* v. *Gopoo Nadaraja Chetty*.

In the case of *Vallinagam Pillai* v. *Pachche*[2] the Court considered that according to the law in Madras the testamentary power of a Hindu might be taken as being co-extensive with his independent right of alienation *inter vivos*. In delivering the jugdment of the Court, Scotland, C. J., expressly guarded himself from laying down any general rule as to how far, or under what circumstances, the law gives to a Hindu the power of disposing of property by will. He said: "We may observe that now that the legal right to make a will is settled, there seems nothing in principle or reason opposed to the exercise of the power being allowed co-extensively (as stated in some of the cases and forcibly urged in *Nagalitchmee Ummal* v. *Gopoo Nadaraja Chetty*[3]) with the independent right of gift or other disposal by act *inter vivos*, which, by law or established usage or custom having force of law, a Hindu now possesses in Madras. To this extent the power of disposition can reasonably be considered to be in conformity with the respective proprietary rights of the possessor of the property and of heirs and coparceners, as provided and secured by the provisions of the Hindu law.[4] The Bombay High Court, in the case of *Narottam Jugjivan* v. *Narsandas Harikisandas*,[5] taking this as a clear authority that at all events in Madras the testamentary power of a Hindu was co-extensive with his independent right of alienation, said they were unable to suggest any good reason why the law in the Mofussil of the Presidency of Bombay should be held to be different. Westropp, J. said, "Even the Supreme Court, where the right of a Hindu to make a will has been always recognised, I have never known it to be argued or held that his testamentary power is co-extensive with that of an Englishman. The will of a Hindu it has been decided by the Privy Council must be regulated by the Hindu law. It has often been ruled in the Supreme Court that he may dispose by will of property wholly acquired by his own exertions and also of separate property acquired by partition of family property or by the non-existence, or if any ever did exist, the extinction of co-parceners (if the members of an un-

[1] 1 Mad. H. C. R. 326.
[2] 1 Mad., H. C. R., 326.
[3] 6 M. I. A. 308.
[4] *Ibid.*, p. 339.
[5] 3 Bom., H. C. R., 6.

divided Hindu family may be so designated) or joint tenants; and no distinction of which I am aware has ever been there taken between it and acquired property either in point of descent or of alienability. On the other hand it has been often held there also that he cannot dispose by will of undivided family property or of any share therein so long as that share remains unsevered from the family stock." In this case the Court held a will in respect of property which was not found to be self-acquired was valid against the title of a remote kinsman as the heir of the testator, the remote kinsman not having been united in food, worship or estate with the testator and therefore having no right of survivorship as a member of an undivided family. It apparently adopted the view that what the testator might have done by an act *inter vivos* he might do by will. In a more recent case, however, decided in 1867, Arnould, J. considered the question was still open to discussion even in the Bombay Courts,[1] but it was not necessary for him to express any opinions on the point. "Whether in the case" he said, "even of separate property the right of disposition by will is strictly co-extensive among Hindus with the right of alienation *inter vivos* is a point that may still perhaps be regarded as open to some question."[2] Previously to that case, Holloway, J. had in 1866 expressed himself to the effect that the doctrine that a man may devise whatever he may give had never been established by judicial decision.[3] In *Vitla Butten* v. *Yamenanema*[4] where an adopted son sought to set aside a will made by his adoptive father disposing of ancestral immoveable property, the Court laid it down that, whereas, in the Madras Presidency, a coparcener could not before partition *convey* away as his interest any *specific* portion of the joint property, he could convey his share, that is, his beneficial interest as an undivided coparcener with the incidental right of partition. But the Court at the same time held the will in question was inoperative because at the moment of the death of the testator the right of survivorship was in conflict with the right of devise, and the title by survivorship being the prior title, took precedence to the exclusion of the title by devise.[5]

This apparently is the view taken by the Bombay Court in *Narottam Jugivan* v. *Narsandas Harikisandas*[6] and in later cases.[7] The same principle has been applied in the case of an attempted devise by one of several co-

[1] *Lakshmibai* v. *Gunpat Moroba*, 4 Bom., H. C. R., 150; on appeal, 5 Bom., H. C. R., 429.

[2] *Ibid.*, p. 158.

[3] *Tarachand* v. *Reeb Ram*, 3 Mad., H. C. R., 50, 55. See *Gooroova Butten* v. *Narrain Swamy Butten*, 8 Mad., H. C R., p. 13.

[4] 8 Mad., H. C. R., 6.

[5] See *Gooroova Butten* v. *Narrain Swamy Butten*, 8 Mad., H. C. R. 13.

[6] 3 Bom, H. C. R., 6, see *supra*, p. 38.

[7] *Udaram* v. *Sitaram* v. *Ranu Panduji*, 11 Bom, H. C. R., 76; *Gungabai* v. *Ramanna* 3 Bom., H. C. 66; *Vrandavandas* v *Yamunbai*, 12 Bom. H C. R 22, 29; *Lakshmishankar* v. *Vaynath* I. L. R., 6 Bom. 24; *Lukshmun Dada Naik* v. *Chandra Dada Naik*, I. L. R. 5 Bom. 45.

widows in respect of property to which she was entitled jointly with her co-widows.[1]

In the case of *Udaram Sitaram* v. *Ranu Panduji*[2] it was held that in the Bombay Presidency while the share of one of the coparceners in a Hindu undivided family in ancestral estate might before partition be seized and sold in execution of a decree, yet a coparcener could not, by simple voluntary gift or by devise, alienate his share to a stranger so as to bind his surviving coparceners after his decease.

In 1867 the Privy Council in dealing with the extent of a father's power of alienation *inter vivos* with a view to determine the question of the extent of his testamentary power, went on to say, "It is too late to contend that because the ancient treatises make no mention of wills, a Hindu cannot make a testamentary disposition of his papers. Decided cases too numerous to be now questioned have determined that the testamentary power exists, and may be exercised at least within the limits which the law prescribes to alienation by gift *inter vivos*. Accordingly it has been settled that even in those parts of India which are governed by the stricter law of the Mitakshara a Hindu, without male descendants, may dispose by will of his separate and self-acquired property, whether moveable or immoveable; and that one having male descendants may so dispose of self-acquired property if moveable, subject, perhaps, to the restriction that he cannot wholly disinherit any one of such descendants."[3] Their lordships then referred to, without deciding, the question whether a father could by will make an unequal distribution among his sons of immovable property whether acquired or ancestral. The question, however, was raised again in a recent Bombay case[4] where a Hindu governed by the Mitakshara and who died possessed of a large amount of ancestral moveable property having two undivided sons, bequeathed almost the whole of it to one of the sons to the exclusion of the other. The Court held that whether it were regarded as a gift or a partition, the devise was inoperative. "It would be impossible," they said "to hold a gift of the great bulk of the family property to one son to the exclusion of the other to be a gift prescribed by the texts of law, for the texts[5] which we next quote distinctly prohibit such an unequal distribution."

The testamentary power of a Hindu female over her *stridhan* is commensurate with her power of disposition over it in her lifetime,[6] but a Hindu female

[1] *Gurvin Reddi* v. *Chupamma*, I. L. R., 7 Mad., 93. See *Rindamma* v. *Venkataramappa*, 3 Mad., H. C. R., 268.

[2] 11 Bom., H. C. R., 76.

[3] *Beer Pertab Sahee* v. *Rajender Pertab Sahee*, 12 Moore's, I. A., 1.

[4] *Lukshmun Dada Naik* v. *Chundra Dada Naik*, I. L. R., 1 Bom. 561.

[5] These texts were Mitak. Ch. I., s. II., paras 1, 6, 14. See 1 Str., H. L. 123.

[6] *Venkata Rama Rao* v. *Venkata Suriya Rao*, I. L. R., 2 Mad., 333 (P. C.); *Behari Lal Sandyal* v. *Juggo Mohun Gossain*, 2 C. L. R., 422.

has no power to bequeath property which she inherits from her husband or father, or property in which she has only a limited interest.[1] Under s. 46 of the Indian Succession Act which has been extended to Hindus, it is expressly declared that a married woman may dispose by will of any property which she can alienate by her own act during her life.[2] By section 3 of the Hindu Wills Act it is now provided that "nothing herein contained shall authorize a testator to bequeath property which he could not have alienated *inter vivos*," and s. 4 of the Probate and Administration Act provides that "nothing herein contained shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person."

According to the law in Madras the right of a son in the womb to ancestral property cannot be defeated by will.[3]

The general result of the cases, so far as the property which may be devised is concerned, seems to be that except where, in the case of an undivided family, the law of devise conflicts with the law of survivorship, in which case the former gives way, the right of testamentary disposition among Hindus is co-extensive with the right of alienation, or, as Mr. Mayne[4] puts it, "whatever property is so completely under the control of the testator that he may give it away during his lifetime, he may also devise by will." This result is recognized by the Legislature in the Hindu Wills and the Probate and Administration Acts.[5]

I now pass on to a consideration of the limits which have been placed upon the testamentary power of Hindus.

In an early case in the Supreme Court in Bengal, Colville, C. J., in discussing the validity of a disposition which had been made by a Hindu testator expressed his opinion that in determining the question we ought to consult first the Hindu law, but that, if that law were silent, we could not infer, from its mere silence, the validity of a testamentary disposition, because, the testamentary power being unknown to the general Hindu law and founded upon local custom recognised and sanctioned by judicial decisions was not to be taken as unlimited, but was

[1] *Ibid. Teencowri Chatterjee* v. *Denonath Banerjee*, 3 W. R., 49; *Dhoolubh Bhaee* v. *Jeevee*, 1 Borr. 75; *Umroot* v. *Kulyandas*, *Ibid.* 314.

[2] See Hindu Wills Act, XXI of 1870, s. 2 and the Probate and Administration Act, V of 1881, s. 149. As to the right of a female to deal by will with accumulations see *infra* p. 55.

[3] *Minakshi* v. *Virappa*, 1. L. R., 8 Mad., 89.

[4] Hindu Law, p. 380.

[5] See Act XXI. of 1870, s. 3 and Act V. of 1881 s. 4. In the Bill introduced in 1881 into the Legislative Council and to which reference has already been made, the extent of the testamentary power among Hindus and also Buddhists was thus declared by s. 2. "Every Hindu and Buddhist may bequeath property in the cases, and to the extent in and to which, he may transfer the same: Provided that when the testator is a member of an undivided family and his right to bequeath conflicts at the time of his death with any right of surviving members of such family the latter right shall prevail.

subject to be *controlled* by the policy of the general law to which the person exercising it, or the property over which it was exercised, was subject, and that the testamentary power was to be regulated by the general policy of the law.[1] In the case before the Court some of the property was situate at Chinsurah, then a Dutch settlement, where the testator was domiciled at the time of his death, and accordingly the Court applied the Roman Dutch law as to all the property except that which was outside the settlement, and as to that the English law was resorted to. "If any law" it was said "foreign to Hindus, was to be invoked in this case, that law, as to all the properties of the testator, the disposition of which was to be governed by the law of his domicile, was the Roman Dutch law which was shown to have been introduced by the Dutch in the exercise of their sovereign power into Chinsurah (much as the law of England was introduced into Calcutta), and that the law of England could be invoked as to so much only of his immoveable property as was situate beyond the limits of the Dutch territories."

The view which was put forward in the case of *Luckunchunder Seal* v. *Koroonamoney Dossee*[2] that the testamentary power among Hindus was to be regulated by the general policy of the law was followed by the Supreme Court in the case of *Sonatun Bysack* v. *Juggutsoondree Dossee*.[3] On appeal, however, the Judicial Committee of the Privy Council observed that the proper principle to be followed with reference to the testamentary power of disposition by Hindus was, that the extent of that power must be regulated by the Hindu law.[4]

In the case of *Goberdhun Bysack* v. *Shamchand Bysack*[5] the principles laid down in case of *Luckunchunder Seal* v. *Koroonamoney Dossee*[6] were discussed at considerable length by Sir Barnes Peacock. He said, "In *Luckunchunder Seal* v. *Koroonamoney Dossee*, 1 Boulnois, 211, the Court seem, to treat the power of making a will as unknown to the general Hindu law and to be founded on local custom, sanctioned by judicial decisions, and therefore was not to be taken as unbounded, but subject to be controlled by the policy of the general law to which the person exercising it, or the property over which it was exercised, was subject. They, therefore, thought it necessary to invoke some foreign law, and as to the property situated in Chinsurah, at which place the testator had died domiciled whilst it was a Dutch settlement, they invoked the Dutch law as to all property except the immoveable situate beyond the bounds of the Dutch territories, and as to that property they invoked the English law. As to the former property they held that the disposition, though bad according to English law,

[1] *Luckunchunder Seal* v. *Koroonamoney Dossee*, 1 Boul., 210.

[2] 1 Boulnois, 210.

[3] 1 M., I. A., 18.

[4] *Sonatun Bysack* v. *Juggutsoondree Dossee*, 8 M., I. A., p. 85, per Turner, L. J.

[5] Bourke's Report, p. 282, note.

[6] 1 Boul., 210.

because tending to alter in perpetuity the rules of succession, was upon the evidence to be deemed valid according to the Roman Dutch law. As to the lands situate beyond the limits of the Dutch territories, they say: 'It seems to us therefore that the testator's intention was to limit the succession of his property as above described, and that that intention was one which according to the rules of English law must fail; whilst according to the Roman Dutch law as proved by the Dutch Jurisconsults it ought to prevail. We have not been referred to any rule or authority of Hindu law which affects the question nor have we ourselves been able to find any. We are therefore of necessity driven to some foreign law.' Notwithstanding the very high respect which we entertain for the opinion of the learned Judges who decided that case, we find ourselves unable to act upon that decision. It appears to us that the validity of the will must be determined according to Hindu law, and according to Hindu law alone. If that law contains no rule against perpetuities we must hold that a devise is not by that law invalid upon the ground that it tends to create a perpetuity. Then why are we to resort to some foreign law which disallows perpetuities? There is no rule of Hindu law which invalidates a conveyance or a gift *inter vivos* upon the ground of its creating a perpetuity. Then why are to seek for some foreign law to render void a bequest contained in a will of a Hindu and which is valid according to Hindu law. Imagine what a system of law we should have to administer if we were told it was Hindu law modified by the policy and principles of English law. If it is contrary to policy to allow the Hindu law to prevail to its full extent let that be modified by the Legislature and not by the Judges. * * * * It is said that the testamentary power of a Hindu is unknown to the Hindu law and is founded upon local custom recognised and sanctioned by judicial decisions. But these decisions are based upon the assumption that the power is given by Hindu law, and although the power is limited to those places in which a particular school of Hindu law prevails, and is modified according to the doctrines, it is still the Hindu law which we have to administer in the same way the Courts administer the Common law where they hold that lands in Kent descend according to custom of gavelkind. If we are to read and give effect to the wills of Hindus, according to the light and policy of the English law, the intentions of nearly every testator will be frustrated. The Judicial Committee appears to have determined the question of perpetuity. That question was raised in a suit brought by Juggutsoondree. Sir J. Colville in his judgement in that case gave effect to the rule against perpetuities, but the Privy Council did not expressly refer to the question, but reversing the decree, commenced by stating that 'it is not improper to observe, with reference to the testamentary power of disposition of Hindus, that the extent of this power must be regulated by Hindu law.'"

It being authoritatively laid down that the extent of the testamentary power

among Hindus must be regulated by the Hindu law or by principles to be deduced from that law, it follows that the law of wills among Hindus is virtually an application of the Hindu Law of succession to testamentary dispositions.

In *Soorjeemony Dossee* v. *Dinobundhoo Mullick*[1] the Privy Council held that a Hindu might bequeath property by way of remainder or by way of executory bequest upon an event which was to happen at the close of a life in being. It is now further settled that he may devise any estate, so long as no one limitation, either as regards the person who is to take or the estate that is to be taken, violates any of the fundamental principles of the Hindu Law.

Upon this branch of the subject, the most important cases is that of *Tagore* v. *Tagore*.[2] There the testator died in 1868, leaving an only son and having made a will in the English language, dated the 18th October 1862. By his will, after reciting that he had already made sufficient provision for his son and that he should take nothing by the will, he devised all his property, real and personal, to trustees, their heirs, executors, administrators, representatives and assigns, as to the personal property upon trust, after paying the funeral expenses, debts and legacies, to sell and invest the proceeds, and out of the annual income to pay the annuities given by the will and also any of the legacies so far as it would suffice; and after payment of the annuities and legacies to pay the surplus unexpended unto the person or persons for the time being entitled to the beneficial enjoyment of the real property, and after all the annuities and legacies should have fallen in and been satisfied, in trust absolutely for the person or persons entitled to the beneficial or absolute enjoyment of the real estate, and, as to the real property, upon trust, until all debts and legacies had been paid and annuities fallen in and been fully satisfied, out of the issues and profits to pay such, if any, of the legacies and of the annuities as the personal estate or income derived therefore should be inadequate to defray, and to pay the residue of the rents, issues and profits unexpended to the person or persons for the time being to whom the real estate is devised for the absolute use of such person or persons respectively. The testator then directed the trustees to hold the real estate generally for the use and benefit of such last mentioned person or persons for the time being, so far as was consistent with the trusts and provisions of the will, and further directed that out of the net annual income the person entitled to the beneficial enjoyment of the real property or of the income or surplus income thereof, should receive Rs. 2,500 a month, and that the various legacies or annuities should be paid gradually, and, as found possible by, the trustees, out of the balance after the last mentioned payment, and so soon as all the legacies and annuities should have fallen in or been paid, then in trust forthwith to convey the real estate unto, and to the use of the person entitled to the beneficial interest therein, subject to the limitations, provisions and directions thereafter contained concerning "the real estate, so far as the

[1] 6 M., I. A., 83.

[2] 4 B. L. R., O. C., 103; on appeal 9 B. L. R., 377.

then condition of circumstances would permit, and so far as such limitations or directions could be introduced into any deed of conveyance or settlement without infringing upon, or violating any rule against perpetuities which might then be in force and apply to the real estate or the conveyance or settlement of it, as last aforesaid, if any such law there be."

The limitations referred to were, "subject always to the devise to the trustees," as follows:

1. To the defendant Jotendra Mohun Tagore for life.

2. To his eldest son, born during the testator's lifetime for life.

3. In strict settlement upon the first and other sons of such eldest son successively in tail male.

4. Similar limitations for life and in tail male upon the other sons of Jotendra Mohan Tagore, born in the testator's lifetime and their sons successively.

5. Limitations in tail male upon the sons of Jotendra Mohan Tagore, born after the testator's death.

6. After the failure or determination of the uses and estates hereinbefore limited to (the defendant) Surendra Mohan Tagore for life.

7. Like limitations for the sons of Surendra Mohan Tagore, and their sons as for the sons of Jotendra Mohan Tagore.

8. Like limitations in favour of the sons of Lalit Mohan Tagore who was deceased at the date of the will, and their sons in tail male as for the sons of Jotendra Mohan Tagore.

The will expressly and exclusively adopted primogeniture in the male line through males, preferring the eldest son and excluding women and their descendants and all right of provision or maintenance of either man or woman.

Jotendra Mohan Tagore had no son born during the lifetime of the testator. Surendra Mohan had a son born in the lifetime of the testator and alive at the time of his death. Lalit Mohan predeceased the testator, but left a grandson by a son deceased during the testator's lifetime. No provision was made by the will for the testator's son, but provision had been previously made for him at the time of his marriage by a gift of a property yielding Rs. 7000 a year. The reason for the exclusion of the son from any benefit under the will was that he had become a Christian in 1851.[1]

The son brought a suit to have the will set aside, except as regarded the payment of debts, legacies and annuities directed by the deceased. It was contended (1) that the will was void as to ancestral estate, (2) that at all events the plaintiff was entitled to reasonable maintenance having regard to the amount and value of the property of the testator; (3) that the devise of a life estate to Jotendra Mohan Tagore and all the subsequent devises were void, because a

[1] Under Act XXI of 1850, the change of religion did not affect his right of inheritance or of suit.

Hindu has no power to devise an estate to trustees for the use of another person; (4) that such devises were void because a Hindu cannot by will create a qualified or particular estate, but must if he devise at all, devise what was expressed as his "whole bundle of rights;". (5) that the estates subsequent to the life-estate to Jotendra Mohan were void for uncertainty, or because they infringed the rule of law against perpetuities.

As to the first point, it was decided both by the Courts in India and by the Privy Council that in Bengal the legal power of transfer was the same as to all property whether ancestral or acquired.[1] The second point was also decided against the plaintiff.[2] The Courts in India were of opinion that in Bengal a man might dispose of all his property to the complete disherison of the heir. Without determining the broader question as to whether there was a moral or legal obligation on the part of a father to provide a reasonable maintenance for his son, the Privy Council considered it was sufficient to hold that the marriage gift previously made by the testator was a reasonable provision for the plaintiff's maintenance.[3]

With reference to the third point the case of *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*[4] was cited as an authority for the position that a Hindu could not devise to trustees. In that case, Peacock, C. J. had said: "I am not aware of any rule of the Hindu law by which grants *inter vivos* or gifts by will in perpetuity are expressly prohibited, but it appears to me that they are quite contrary to the whole scope and intention of the Hindu law, and that there are no means according to that law by which such gifts or grants can be effected. The Hindu Law so far as I am acquainted with it makes no provision for trusts," and in a subsequent part of the same case, he said: "It appears to me that putting out of the question the case of religious endowments, the consideration of which is wholly unnecessary in the present case, a devise by a Hindu upon trusts which would be void as a condition is void in the shape of a trust." In *Tagore* v. *Tagore*, Peacock, C. J., explained that all he laid down, in the case to which I have referred, was that a devise for a purpose which would be void as a condition would be void in the shape of a trust, adding that in his opinion a Hindu could not by the intervention of trustees create any beneficial interest which he could not create without the intervention of trustees.[5] He accordingly held, as the original Court had held, that the devises were not void merely upon the ground that the estates were devised upon trust.[6] The Judicial Committee placed the question as

[1] 4 B. L. R., 159, 9 B. L. R., 396.
[2] 4 B. L. R., 160, 9 B. L. R., 413.
[3] 9 B. L. R., 413.
[4] 2 B. L. R., O. C., 36.
[5] 4 B. L. R., (O. C.), 162,
[6] See *Krishnaramani Dasi v. Ananda Krishna Bose*, 4 B. L. R., (O. C.), 231; *Kumara Asima Deb* v. *Kumara Kumara Krishna Deb*, 2 B. L. R., (O. C), 11.

to the admissibility of trusts in the case of the estates of Hindus beyond a doubt, and pointed out that the distinction between the terms "legal" and "equitable," as applied to estates, represents only the accident of falling under diverse jurisdictions and not the essential characteristic of a possession in one person for the convenience and benefit of another.[1] "The anomalous law" they said "which has grown up in England of a legal estate which is paramount in one set of Courts and an equitable ownership which is paramount in Courts of Equity does not exist in and ought not to be introduced into Hindu Law. But it is obvious that property, whether moveable or immoveable, must for many purposes be vested more or less absolutely in some person or persons for the benefit of other persons, and trusts of various kinds have been recognised and acted upon in India in many cases."[2]

The fourth point, that the devise of the life estate to Jotendra Mohan Tagore was void because the Hindu law recognises only one entire estate in land and does not allow of that estate being cut up into smaller and distinct interests in the way of life estates, reversions and remainders and so forth, was decided by all the Courts, including the Privy Council, against the plaintiff. The Judicial Committee said: "In the absence of any authority for so extraordinary a limitation of the right of property as would forbid a present parting with the exclusive possession and enjoyment for a time, their Lordship entertain no doubt that possession and enjoyment may be so dealt with, and that there is no objection to a similar interest being given by will."

The fifth point, so far as the subsequent estates were concerned, was decided in favour of the plaintiff.

The contention that the devise to Jotendra Mohan Tagore was bad for uncertainty was negatived, the Courts holding[3] that the will should be read, alike according to its words and substance, as giving a life interest subject to a charge for payment of legacies and annuities whereby the rents over and above Rs. 2,500 per month and the expense of maintenance were to be applied in aid of another fund until the legacies were paid, and that the devise to him was dependent upon the contingency whether he should or should not be living when the legacies and annuities should be completely discharged. The subsequent estates were held to be void, not because they infringed the law of perpetuities, which, as pointed out by Peacock, C. J., was no part of the Hindu law, and was therefore inapplicable to the will in question, but because they were contrary to the principles of Hindu law, with reference to which alone the extent of the testamentary dispositions of Hindus must be regulated.[4] It was

[1] 9 B. L. R., 402.

[2] 9 B. L. R., 401.

[3] 4 B. L. R., O. C., 171, 9 B. L. R., 406.

[4] 4 B. L. R., 167, 168, 169. See *Bhubon Moyee Debia* v. *Ram Krishore Acharj Chowdry*, 10

held that the testator had attempted to create a novel line of inheritance—an estate in tail male in each series of limitations, which was wholly unauthorized by the Hindu law. "Inheritance" said Willes, J., quoting Domat, "is a rule laid down (or, in case of custom, recognised) by the State, not merely for the benefit of individuals but for reasons of public property.[1] It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail and the inheritance take place as the law directs."[2] Further on Willes, J. thus enunciated the conclusion at which he had arrived: "It follows that estates of inheritance created by gift or will so far as they are inconsistent with the general rules of inheritance are void as such, and that by Hindu law no person can succeed thereunder as heir to estates described in the terms which in English law would designate estates tail."[3]

A contention was raised that, if the devisees could not take as heirs in tail or heirs of inheritance not recognised by law, they were sufficiently designated to take successively by way of gift that which the will incorrectly assumed to give them as heirs, so that they might be regarded as a succession of donees for life. Now in Bengal, we have seen that the legal power of transfer is the same in respect of all property whether ancestral or acquired, and a gift of such property can only take effect if the donee is in existence and capable of taking from the donor. "The donee's right," according to the Dayabhaga, "to the thing arises from the act of the giver, namely, from his relinquishment in favour of the donee who is a sentient person.[4] Applying that principle to the case of testamentary dispositions, the Privy Council held that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must neither in fact or in contemplation of law, be in existence at the death of the testator. A person according to the general rule of jurisprudence is said to be in existence in contemplation of law if he is in embryo. But the Hindu Law recognises an adopted child whether he is adopted in the lifetime of his father or after his death under a power given before his death, as actually begotten by the father, and accordingly under Hindu law such child must be taken to be in existence in contemplation of law. Jotendra Mohun Tagore at the death of the testator had no children. If he should subsequently have had children either natural or adopted, these could not, if we apply this principle, have taken, because they were not in existence either in fact or contemplation of law at the time of testator's death.

Moore's, I. A., 308; *Sonatun Bysack* v. *Juggut Soonderee Dossee*, 8 Moore's I. A., 85; *Mullick* v. *Mullick*, 1 Knapp, P. C., 247, per Lord Wynford.

[1] Domat, 2413.

[2] 9 B. L. R., 394.

[3] 9 B. L. R., 396

[4] Dayabh. Ch. I, V. 21.

The other two series of estates were both represented by persons in being but these estates were only to take effect "upon the failure or determination" of the previous estates, and it was held that these words contemplated the fact of those estates being legal and valid, and that, as they were illegal and invalid, no effect could be given to the directions as to the further devolution of the property.[1] The limitations over, it was said, were in the scheme of the will intended to follow the creation of the prior estates of inheritance and therefore must be taken to fall with them.[2] The result was that the estates or interests attempted to be created, subsequent to the life estate of Jotendra Mohan Tagore failed, and the plaintiff, therefore, was entitled to the whole estate after the death of the tenant-for-life, subject to the payment of legacies and annuities.

The case of *Tagore* v. *Tagore* is of great importance as having laid down a number of well defined limits to the testamentary powers of a Hindu, in respect, not only of the persons who may take under a devise, but in respect of the estates which may be created by will. It was settled, as we have seen, by the decision in that case, that in order to take under a will a person must be in existence, either in fact or in contemplation of law, at the time of the testator's death. It was also settled that a Hindu cannot by gift or will create a new estate unknown to the Hindu law, or make property inheritable otherwise than that law directs. The question, too, as to the validity of trusts in the case of Hindus has been placed beyond a doubt by the same decision.[3]

In Bombay, it has been held that the doctrine laid down in the *Tagore* case that only a person either in fact or in contemplation of law in existence at the death of the testator can take under his will is a general principle of Hindu law applicable as well to Hindus governed by the law of the Mitakshara as those governed by the Dayabhaga.[4]

Although, as we have seen, trusts are now exprsssly recognised as valid, it must always be borne in mind that what cannot be done by a gift cannot be done by the intervention of a trust.[5] Thus, where there was a family arrangement made, the object of which was to settle the family property in trust for the maintenance of the members of the family, born and to be born, it was held to be illegal.[6]

[1] 9 B. L. R., 409.

[2] *Ibid.*, 410.

[3] *Tagore* v. *Tagore*, 9 B. L. R., 377. See *Kumara Akima Krishna Deb* v. *Kumara Kumara Krishna Deb*, 7 B. L. R., pp 26, 27; *Sonatun Bysack* v. *Juggut Soonderee Dossee*, 8 Moore's I. A., 66; *Shookmoychandra Das* v. *Monohari Dasi*, I. L. R., 7 Cal., 269, 270.

[4] *Manguldas Nathubhoy* v. *Krishnabai*, I. L. R., 6 Bom., 38.

[5] *Rajender Dutt* v. *Sham Chund Mitter*, I. L. R., 6 Cal. 106; *Krishnaramani Dasi* v. *Ananda Krishna Bose*, 4 B. L. R., O. C., 231.

[6] *Rajender Dutt* v. *Sham Chand Mitter*, I. L. R., 6 Cal. 106.

The question, whether a Hindu can by will create a perpetuity was discussed in the case of *Goberdhun Bysack* v. *Sham Chund Bysack*[1] to which I have already referred. In that case Peacock, C. J., stated that there being no rule of Hindu law against perpetuities, a devise could not by that law be held to be invalid on the ground that it tends to create a perpetuity, and he was supposed to have laid down that the rule of English law against perpetuities was not binding in case of a Hindu will. In a subsequent case[2] he explained that he never intended to lay that down as a general proposition. All that he meant to say was, that the English law against perpetuities could not be engrafted on a Hindu will. Whether the Hindu law warrants the creation of a perpetuity either by will or deed of gift, he went on to say, must depend upon the Hindu law alone, and not upon the Hindu law supplemented by English law.

The question as to perpetuities was raised again in the case of *Krishnaramani Dasi* v. *Ananda Krishna Bose*,[3] and there it was held that gifts by will in the nature of perpetuities, except in the case of religious endowments, were contrary to the scope and intention of Hindu law and were wholly void.

Gifts in favour of idols though in their nature perpetual, are not invalid.[4] They form an exception to the general rule against perpetuities now laid down by the Courts. It being assumed to be a principle of Hindu law that a gift can be made to an idol which is a *caput mortuum* and incapable of alienating, that principle, it was said, cannot be broken in upon by ingrafting upon it the English law of perpetuities.[5] The Courts, however, will not allow the rule against perpetuities to be avoided, by dedications or gifts to idols which are merely colourable. Thus, where a Hindu by will devised certain property consisting of a family dwelling-house and land to trustees forever for the residence, maintenance and performance of the worship of certain family idols, and appointed his sons and their descendants in the strict male line to be shebaits of the idols forever, making provision for their residence in the family dwelling house; and the will also contained a clause restraining any partition, division or alienation of the property so dedicated to the idols; and the testator appointed the trustees executors of his will, and by a codicil bequeathed legacies to various members of the family, it was held that the devise of the property was void and inoperative, as being

[1] Bourke's Rep. 282, note. See *supra*, pp. 42, 43

[2] *Kumara Asima Krishna* v. *Kumara Kumara Krishna*, 2 B. L. R., (O. C.) p. 32.

[3] 4 B. L. R., O. C., 231.

[4] *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*, 2 B. L. R., O. C., 47, per Markby, J.; *Krishnaramani Dasi* v. *Ananda Krishna Bose*, 4 B. L. R., O. C., 231; *Tagore* v. *Tagore*, 9 B. L. R., 377; *Rajender Dutt* v. *Sham Chand Mitter* I. L. R., 6 Cal., 106.

[5] Per Markby, J., in *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*, 2 B. L. R., O. C., p. 47.

a settlement in perpetuity on the male descendants of the testator and for their use, and not a real dedication for the worship of the idol.[1] In a more recent case, also, trusts for maintenance and certain religious trusts were held to be void as being mere perpetual trusts for the benefit of the family of the testator.[2] Property, however, may be validly devised subject to trusts in favour of idols. Thus, where a Hindu by will gave all his moveable and immoveable property to the family idol, and, after stating that he had four sons, he directed that his property should never be divided by them, their sons or grandsons in succession, but that they should enjoy "the surplus proceeds only," and the will, after appointing one of the sons manager of the estate to attend to the festivals and ceremonies of the idol, and maintain the family, further directed that whatever might be the surplus, after deducting the whole of the expenditure, the same should be added to the corpus, and in the event of a disagreement between the sons and family, the testator directed that, after the expenses attending the estate, the idol, and maintenance of the family, whatever nett produce and surplus there might be, should be divided annually in the certain proportions among the members of the family, it was held that the bequest to the idol was not an absolute gift, but was to be construed as a gift to the testator's four sons and their offspring in the male line as a joint family (the family being joint), so long as the family remained joint, and that the four sons were entitled to the surplus of the property after providing for the performance of the ceremonies and festivals of the idol, and carrying out the provisions in the will for maintenance.[3] So, where a Hindu lady by her will left to her sons, lands belonging to her to support the daily worship of an idol and defray the expenses of certain other religious ceremonies, with a provision that, in the event of there being a surplus after these uses had been satisfied out of the revenue of the lands, the surplus should be applied towards the support of the family, it was held that this provision amounted to a bequest of the surplus to the members of the joint family for their own use and benefit, and that each of the sons of the testatrix took a share in the property, which, after satisfying the religious and ceremonial trusts, might it was said, be considerable, and could not be presumed to be valueless.[4]

It has been held that a trust for the accumulation for 99 years of the surplus income, after certain yearly payments, of the testator's estate to be applied in the purchase of zemindaries for time to time, there being no disposition of the beneficial interest in the zemindaries so to be purchased, was void as not being

[1] *Promotho Dossee* v. *Radhika Persaud Dutt*, 14 B. L R., 175. See *Ananthu T. Churn* v *Naga Muhu Ambalagaren*, I. L. R, 4 Mad. 200.

[2] *Chundramoney Dossi* v. *Matilal Mullick*, 5 C. L. R., 496.

[3] *Sonatun Bysack* v. *Juggut Soonderee Dosse*, 8 M., I. A. 66.

[4] *Ashutosh Dutt* v. *Doorga Churn Chatterjee*, I. L. R., 5 Cal., 438, (S. C.) L. R. 6 I. A., 182; (S. C.) 5 C. L. R., 296. See *Ram Coomar Paul* v. *Jogendra Nath Paul*, 1. L. R., 4, Cal. 56.

sanctioned by Hindu law.[1] It was argued that such a trust was nowhere expressly prohibited by the Hindu law and therefore it might be taken as valid. In dealing with this argument Markby, J., said that in his opinion such a gift of property, whether made by deed or will, would be equally foreign to the general habits, ideas and usages of Hindus, and in excess of the rights of property as recognised generally in India, and accordingly he held it to be void. In the lower Court, Norman, J. had taken the same view. He said, "A testator cannot in giving his property by will impose conditions in contravention of the objects for which property exists, or contrary to the policy of the law. For instance, suppose an estate were given to a man on condition that it should be allowed to relapse into jungle, or never be cultivated, no one could doubt that such a condition would be void."[2] Again, where there was a trust for the accumulation of a fund until it should amount to Rs. 300,000, which was then to be divided and a fresh accumulation started, it was held to be wholly bad as being in fact part and parcel of the creation of a perpetuity, for, notwithstanding the division from time to time, the trust itself was in truth perpetual.[3]

If there is a good gift of an estate but there is also a prohibition against alienation or against partition by those entitled to divide or there is an invalid restriction, the prohibition or restriction will be void.[4] Thus where a Hindu by his will gave all his immoveable property to his sons but postponed their enjoyment of it by a clause that they should not make any division for 20 years, it was held that the restriction was void as being a condition repugnant to the gift, and that the sons were entitled to partition at once.[5] A direction, however, that until the youngest son should attain majority, none of the sons should have a right to partition has been held to be valid.[6] Where there was a gift over on the whole of the male issue of the son of the testator dying without issue under the age of 21, the gift was held to be invalid on the ground that by Hindu law an estate cannot remain in suspense or abeyance and without an owner.[7]

[1] *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*, 2. B. L. R., O. C., 11.

[2] 2 B. L. R., (O. C.) p. 24.

[3] *Krishnaramani Dasi* v. *Ananda Krishna Bose*, 4 B. L. R., O. C., 231, p. 294.

[4] See *Tagore* v. *Tagore*, 9 B. L. R., p. 404; *Krishnaramani Dasi* v. *Ananda Krishna Bose*, 4 B. L. R., O. C., 231; *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*, 2 B. L. R., O. C., 26, 27; *Shookmoy Chundra Das* v. *Monohari Dasi*, I. L. R., 7 Cal., p. 279, per Field, J., affirmed I. L. R., 11 Cal., 684. See *Raikishori Dasi* v. *Debendronath Sircar*, I. L. R., 15 Cal. 409, P. C. See also Indian Succession Act, Part XVII, ss. 125—127.

[5] *Mokoondo Lall Shaw* v. *Gonesh Chunder Shaw*, I. L. R., 1 Cal., 104; *Ramalinga Khanapure* v. *Virupakshi Khanapure*, I. L. R., 7 Bom., 538; *Rajender Dutt* v. *Shamchand Mitter*, I. L. R., 6 Cal., 106; *Anantha Tirtha Chariar* v. *Nagamutha*, I. L. R., 4 Mad., 200. See *Ashutosh Dutt* v. *Doorga Churn Chatterjee*, L. R., 6 I. A., 182, (S. C.), I. L. R., 5 Cal., 438.

[6] *Raikishori Dasi* v. *Debendranath Sircar*, I. L. R., 15 Cal., 409, (P. C.)

[7] *Bramamayi* v. *Jages Chandra Dutt*, 8 B. L. R., 400, p. 407.

The law in England relating to gifts to superstitious uses does not apply to the case of Hindu religious endowments.[1]

In the case of *Sonatun Bysack* v. *Juggutsoondree Dossee*,[2] it was held that a Hindu could not by his will interfere with his widow's right of maintenance.

A condition imposed upon a bequest that its subject matter should devolve on male descendants only is invalid, as being a condition making property inheritable otherwise than in accordance with the law.[3] In the case of *Tagore* v. *Tagore*[4] it was said that a private individual who attempts by gift or will to make property heritable otherwise than the law directs is assuming to legislate, and the attempted disposition must fail and the inheritance take place as the law directs. The Judicial Committee in the same case went on to illustrate their meaning. They observed—"If on the other hand the gift were to a man and his heirs to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth, forever, to take as his heirs to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, insomuch as an inheritance so described is not legal, such a gift cannot take effect, except in favour of such persons as could take under a gift to the extent to which the gift is consistent with law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void."[5]

A condition binding the legatee not to alienate the estate from the natural line by adoption[6] is inconsistent with Hindu law and therefore void. So a Hindu cannot by will limit his son's general right to adopt an heir.[7] In the case

[1] *Khusalchand* v. *Mahadevjai*, 12 Bom., H. C. R., 214 See *Mohant Burm Suroop Dass* v. *Khashee Jha*, 20 W. R., 471; *Ramtonoo* v. *Ramgopal*, 1 Knapp, 245; *Juggutmohini* v. *Sokheemoney*, 14 M., I. A., 289.

[2] 8 Moo. I. A., 66.

[3] *Kumar Tarakeswar Roy* v. *Kumar Shoshi Shikhareswar*, L. R., 10 I. A., 51; (S. C.). I. L. R., 10 Cal., 952; *Tagore* v. *Tagore*, 9 B L R, 377. See *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry*, L. R.; 5 I. A., 138; *Ram Lall Mookerjee* v. *Secy. of State*, L. R., 8 I. A., 46.

[4] 9 B. L. R., 377.

[5] See *Venkata Mahapati Surya* v. *Venkata Mahapati Gangadhara*, L. R., 13 I. A., 97, (S. C.) I. L. R., 9 Mad., 499; *Ramlinga Khanapure* v, *Virupakshi Khanapure*, I. L. R., 7 Bom., 538.

[6] *Venkata Mahapati Surya* v. *Venkata Mahapati Gungadhara* L. R., 13 I. A., 97, (S. C.) I. L. R., 9 Mad., 499.

[7] *Ranee Hurrosoondery* v. *Cowar Kisto Nauth Roy*, Fult. 393.

of *Bramomoyi Dasi* v. *Jages Chandra Dutt*,[1] a direction postponing the enjoyment of the estate beyond the majority of the devisee was held to be void on the ground that by Hindu law an estate could not remain in suspense or abeyance and without an owner.[2]

In the case of *Alangamanjori Debi* v. *Sonamoni Debi*,[3] a Hindu who died in 1873, leaving three daughters, made a will in 1872, which provided as follows: "Should I never have a son, in that case my daughters' sons when they come to years of discretion shall receive the properties in equal shares. If any daughter be childless or become a widow, she shall receive a monthly allowance of Rs. 10, as long as she lives and resides in the ancestral family dwelling house." It was contended that the bequest to the daughters' sons was invalid according to the Tagore case as being a bequest to unborn persons. On the other hand, it was urged that the law as laid down in that case had been altered by the Hindu Wills Act, and that under that Act[4] the bequest was valid. The latter view was taken by Wilson, J., in the Original Court. The case, however was appealed, but before the appeal came on for hearing the decision of Wilson, J. was relied upon in another case[5] before Garth, C. J., and Pontifex, J. The latter learned Judge discussed the decision at length and expressed a very strong opinion against the soundness of the conclusion arrived at by Wilson, J. His remarks, however, were purely extra-judicial, as it was not necessary for the purposes of the case before him to come to any decision upon the point raised. When the appeal in the case of *Alangamanjori Debi* v. *Sonamoni Debi*,[6] came on for hearing the opinion expressed by Pontifex, J., was followed, and the decision of Wilson, J., was reversed, on the ground that the bequest to the unborn children of the testator's daughters was an attempt "to create in property an interest" which the testator could not have created before the passing of the Hindu Wills Act, and was therefore, under the last proviso to s. 3 of that Act, void. The Hindu Wills Act, after setting out the sections applicable to Hindus, Jains, Sikhs and Buddhists within certain local limits, by s. 3 provided that nothing therein contained should "authorize any Hindu, Jain, Sikh or Buddhist to create any interest which he could not have created before the 1st day of September 1870" (the day on which the Act came into force). The Probate and Administration Act[7] which by s. 1, declared that Chapters II to XIII, in-

[1] 8 B. L. R., 400. See *supra*, p. 52.

[2] As to directions as to the application or enjoyment of bequests, see Indian Succession Act, Part XVII, which is made applicable to Hindus etc. by the Hindu Wills Act, s. 2.

[3] 8 C. L. R., 121 S. C., I. L. R., 8 Cal., 157.

[4] S. 3, last proviso.

[5] *Callynauth Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhury*, 10 C. L. R., 207; I. L. R., 8 Cal., 578.

[6] 10 C. L R., 459; (S. C.), I. L. R., 8 Cal. 657.

[7] Act V. of 1881.

clusive, should apply in the case of every Hindu,[1] Muhammedan, Buddhist and persons exempted under s. 332 of the Indian Succession Act, dying before, on or after the 1st day of April 1881, subject to certain provisos, by s. 149, provided that "nothing herein contained shall (*a*) validate any testamentary disposition which would otherwise have been invalid, (*b*) invalidate any such disposition which would otherwise have been valid, or (*c*) deprive any person of any right of maintenance to which he would otherwise have been entitled."

A married woman cannot legally devise any property which she inherits in the usual course through her husband or her father, for in such property she has only a limited interest,[2] but it is otherwise, as we have seen, in respect of her *stridhan*, which she is at liberty to dispose of either by gift, will or sale, except in the case of immoveable property given to her by her husband.[3]

Under Expl. I. to s. 46 of the Indian Succession Act, in cases where by the Wills Act it applies, a Hindu married woman will still be incapable of making a valid testamentary disposition of property inherited from her husband. According to that explanation she may dispose of any property which she could alienate by her own act during her life.[4] In *Bhagabutti Daee* v. *Chowdhury Bholanath Thakoor*[5] it was decided that a Hindu widow has no greater power of alienation over the profits than she has over the corpus of her husband's estate, and that whatever she purchases out of the profits is an increment to the corpus. In *Hunsbati Koerain* v. *Ishuri Dut Koer*[6] the question was raised in the High Court whether since the Hindu Wills Act, which made s. 46 of the Indian Succession Act applicable to Hindus, a Hindu widow may not dispose by will of accumulations in her hands at her death. It was unnecessary, however, to decide the question. Ainslie, J., thus dealt with the question. He said,—"By the Hindu Wills Act, XXI of 1870, s. 2, extending s. 46 of Act X of 1865 to Hindus, and by s. 3 of the former Act, every person may dispose by will of that which he or she may alienate *inter vivos*, and this would seem to involve this consequence that a Hindu widow may keep property acquired from accumulations in her own hand up to her death and then sever it from the estate of her husband, so that, although it will not pass as *stridhan* under

[1] The term "Hindu" in s. 331 of the India Succession Act was held to include a Jain—*Buchebi* v. *Makhanlal*, I. L. R., 3 All., 55, and also a Sikh *Chotay Lal* v. *Chunnoo Lal*, I. L. R., 4 Cal., 744.

[2] See *Mahomed Shumsool* v. *Shewkram*, L R., 2 I. A., 7. p. 14.

[3] *Tseencowrie Chatterjee* v. *Dinonath Banerjee*, 3 W. R., 49; *Behary Lall Sandyal* v. *Juggo Mohan Gossain*, 2 C. L. R, 422; *Gobinmani Dosi* v. *Sham Lal Bysack*, B. L. R., Sup., Vol. 48; See now Act X. of 1865, s. 46, Hindu Wills Act, ss. 2, 3, and Act V of 1881, s. 149. See *supra*, p. 41.

[4] Act X of 1865, s. 46.

[5] L. R., 2 I. A., 256.

[6] 4 C. L. R., 11, (S. C.), I. L R., 5 Cal., 512.

Hindu law, she can secure that it will pass as if the law regulating the descent of woman's property applied to it. This is an extension of a Hindu widow's dominion over property which she only holds for the estate of a Hindu widow which may be a logical consequence of the decisions as to the status of such persons, but which it is not easy to reconcile with what I believe to be the universal custom of the country." On appeal the Judicial Committee of the Privy Council did not deal with the question raised by Ainslie, J. Upon a review of the previous cases they held that if a widow made no attempt to dispose of the savings from her husband's estate in her lifetime, there was no dispute but that they followed the estate from which they arose. They did not think it possible, however, "to lay down any sharp definition of the line which separates accretions to the husband's estate from income held in suspense in the hands of the widow and as to which she has not determined whether or not she will spend it."[1]

In the case of *Soorjeemony Dossee* v. *Dinobundhoo Mullick*,[2] the Judicial Committee held that a widow was entitled absolutely in her own right to the interest and accumulations which had since her husband's death arisen from a fund which came to her as a Hindu widow. In a later case,[3] however, the Judicial Committee showed a disposition to recede from the position which they had laid down. In a case on the original side of the High Court, A. G. Macpherson, J., held that there was a distinction between accumulations and income, and that there was no authority which permitted a widow to deal with accumulations as she might with income.[4] In the case of *Puddo Monee Dossee* v. *Dwarkanath Biswas*,[5] it was held that purchases by a widow out of current income might be reconverted into money and the proceeds spent. The Court there considered that where a widow having no present occasion for spending money but, foreseeing one after a year or two, had thought it, advisable to invest money derived from her husband's estate in land, the property purchased would not become an addition to the *corpus*, but that, even in that case, she might re-sell the land and take the money and spend it. But what are accumulations? "Not surely" said the Court[6] "the accidental balances of one or two years of the widow's income, but a fund distinct and tangible. There is nothing whatever in the case to indicate that any such fund ever had been formed or had existed, and we see no reason to suppose that accumulations had ever arisen, except that the widow may have spent in some years more, in others less, and in that sense the savings of the less costly year might be an accumulation to meet the charges of the next."

[1] *Isri Dut Koer* v. *Hansbutti Koerain*, I. L. R., 10 Cal., 324.

[2] 9 Moore's, I. A., 123.

[3] *Gonda Kooer* v. *Kooer Oodey Singh*, 14 B. L. R., 159.

[4] *Grose* v. *Amirtamoyee Dossee*, 4 B. L. R., (O. C.), 40.

[5] 25 W. R, 335.

[6] *Ibid.*, p. 341.

In a recent case,[1] on the original side of the High Court of Calcutta, where all the previous decisions were discussed, it was said that the question to be considered, in determining a widow's right to deal with income and accumulations of income, was one of intention. If she invested her savings in such a manner as to show an intention to augment her husband's estate she could not afterwards deal with such investments, except for reasons which would justify her dealing with the original estate, but if she had evinced no such intention, she could at any rate during her lifetime, deal with the profits. Where she invests her income, making a distinction between the investments and the original estate, she might at any time afterwards deal with the investments, except, it was said, in the case of the purchase of other property as a permanent investment. But should she invest her savings in property held by her without making any distinction between the original estate and the after purchases, the *primâ facie* presumption would be, that it had been her intention to keep the estate one and entire, and that the after purchases were an increment to the corpus.[2]

The question raised by Ainslie, J. in the case of *Hunsbati Koerain* v. *Ishuri Dut Koer*[3] has never actually been decided. In the case of *Grish Chunder Roy* v. *Broughton*,[4] the Court was careful not to enlarge the right of a Hindu widow to deal with accumulations, as to which she had shown an intention not to augment her husband's estate in her lifetime. But, if during her lifetime she has the power to deal with such accumulations, then, under s. 46, Expl. I. of the Indian Succession Act, which declares that a married woman may dispose of any property which she could alienate by her own act during her lifetime, it seems to follow, as suggested by Ainslie, J., that she may validly dispose of such accumulations by will.

A minor is incapable of making a will.[5] Under Hindu law minority terminated at the age of 16, but now in cases to which the Hindu Wills Act applies, a "minor" is one who has not completed the age of 18 years.

The ancient Hindu Law, as we have seen, did not contemplate wills, and consequently there are no directions in that law as to the formalities necessary to execution, attestation or revocation of wills. No particular formalities, therefore, were required before the passing of the Hindu Wills Act.[6] Before that Act a Hindu could have made a nuncupative will in respect of either moveable or

[1] *Grish Chunder Roy* v. *Broughton*, I. L. R., 14 Cal., 861. This case was decided by one Judge sitting on the Original Side of the Court, and at the time these Lectures were in the press an appeal was pending from the decision.

[2] See *Sheolochun Singh* v. *Saheb Singh*, I. L. R., 14 Cal., 387.

[3] 4 C. L. R., 11, (S. C.), I. L. R., 11 Cal., 512.

[4] I. L. R., 14 Cal., 861.

[5] *Cossinath Bysack* v *Hurrosoonderry*, 2 Morley's Dig., 198.

[6] *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog*, 6 Bom., H. C. R., 224, *Mancharji*

immoveable property[1] but in the case of nuncupative wills the strictest proof was always necessary.[2] It was not even necessary that a will should be signed[3] or attested.[4] All that was requisite was that it should have been a complete instrument and should express the deliberate intentions of the testator.[5] Accordingly a testamentary paper might be in any form. Thus petitions[6] and replies in answer to inquiries by officials,[7] containing directions by the owner as to the intended devolution of the property after his death have been treated as testamentary.

In Bombay a nuncupative will made in 1871 after the Hindu Wills Act came into force, but not dealing with any immoveable property to which that Act applied, was held to be valid[8].

Before the Hindu Wills Act, the will of a Hindu might be revoked by parol, and, where definite authority was given by him to destroy the will with the intention of revoking it, that was in law a sufficient revocation, although the instrument was not in fact destroyed.[9]

In construing Hindu wills not subject to the Hindu Wills Act the Court must look to the intention of the testator, as we shall find it does in the case of English wills and wills under the Indian Succession Act. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and, where this is the case, those circumstances must be regarded. Amongst the circumstances thus to be regarded is the law of the country under which the will and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular deposition a particular effect, it must be assumed that the testator, in the disposition which he has made, had regard to that meaning and effect, unless the language of the will or the surrounding circumstances displace that assumption.[10]

Pestonji v. *Narayan Lukshumanji*, 1 Bom., H. C. R., 77; *Crinivas Ammal* v. *Vijayammal*, 2 Mad., H. C. R., 37.

[1] *Crinivas Ammal* v. *Vijayammal*, 2 Mad., H. C. R., 37; *Beer Pertap Sahee* v. *Maharajah Rajender Pertap Sahee*, 12 M., I. A., 1.

[2] *Beer Pertap Sahee* v. *Maharajah Rajender Pertap Sahee*, 12 M., I. A., 1.

[3] *Venayak Narayan Jog* v. *Govindra Chintaman Jog*, 6 Bom., H. C. R., 224.

[4] *Mancharji Pestonji* v. *Narayan Lakshmanji*, 1 Bom., H. C. R., 77.

[5] *Venayak Narayan Jog* v. *Govindra Chintaman Jog*, 6 Bom., H. C. R., 224.

[6] *Hurpurshad* v. *Dyal*, L. R., 3 I. A., 259; S. C., 26 W. R., 55.

[7] *Mahomed Shumsool* v. *Shewkram*, L. R., 2 I. A., 7 (S. C.), 14 B. L. R., 226.

[8] *Bhugvan Dullobh* v. *Kala Shankur*, I. L. R., 1 Bom., 641.

[9] *Maharajah Pertab Narain Singh* v. *Maharani Subhao Koer*, I. L. R., 3 Cal., 626; (S. C.), 1 C. L. R., 113; (S. C.), L. R., 4 I. A., 228.

[10] *Sooryeemoney Dossee* v. *Denobundhoo Mullick*, 6 M., I. A., p. 550, per Turner, L. J. See

In *Tagore* v. *Tagore*,[1] Willes, J said: "If the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to the name or description, or in any other manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced to the extent and in the form, which the law allows. Accordingly, if the gift confers an estate upon a man with words imperfectly describing the kind of inheritance, it would, in the absence of a conflicting text, carry by Hindu law (as, under the present state of law, it does in England) an estate of inheritance."

In the case of Hindu wills in which there are gifts to females, as we have seen,[2] the Courts take into consideration the ordinary notions and wishes of Hindus in respect to the devolution of property and they consider that it may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, should be retained in his family, and that he knows that, as a general rule at all events, women do not take absolute estates of inheritance which they are enabled to alienate. Accordingly, under a simple gift of immoveable property a Hindu female ordinarily takes a life-estate only, though in respect of moveables she would take under the same gift an absolute estate.[3] In the case of the immoveable property, to give his widow an absolute estate, it is necessary for the husband to give her in express terms a heritable right or power of alienation.[4]

It is a general principle applicable, not only according to English law, but according to Hindu law, that a benignant construction is to be used in construing wills,[5] but the Court cannot in a case where the intention of the testator is clear to create an estate not recognised by the law, invent a new will for the testator at variance with his expressed wishes.[6]

It is not necessary that there should be any express declaration of the testator's intention or desire to disinherit his sons or other heirs if there is an actual gift to some other person expressed in clear and unequivocal terms.[7] A mere declaration that the heir will not take any part of the testator's estate will not be sufficient to disinherit him, for unless there is a valid gift of the estate to

Lallabhai Bapubhai v. *Mankuverbhai*, I. L. R., 2 Bom., p. 409. See also *Prosunno Coomar Ghose* v. *Tarrucknath Sirkar*, 10 B. L. R., p. 284.

[1] 9 B. L. R., p. 395.

[2] *Supra*, p. 18.

[3] *Koonjbehary Dhur* v. *Premchand Dutt*, I. L. R., 5 Cal., 684; (S. C.), 5 C. L. R., 561.

[4] *Ibid.* See *Prosunno Coomar Ghose* v. *Tarrucknath Sirkar*, 10 B. L. R., 267, p. 284. *Pabitra Dossee* v. *Damudar Jana*, 7 B. L. R., 697; *Kollany Kooer* v. *Luchmee Pershad*, 24 W. R., 395; *Jewun Punda* v. *Sona*, 1 All., H. C. R., 6.

[5] *Tagore* v. *Tagore*, 9 B. L. R., 395.

[6] *Tagore* v. *Tagore*, 9 B. L. R., 407-8.

[7] *Tagore* v. *Tagore*, 4 B. L. R., O. C. J., p. 187; *Prosunno Coomar Ghose* v. *Tarrucknath Sirkar*, 10 B. L. R., 267.

some one else, he will take by inheritance whatever is not validly disposed of by the will [1]

As to the power of an executor of a Hindu will not governed by the Hindu Wills Act, Phear, J., said "Probate does not confer upon the executor of a Hindu will any personal rights of property analogous to an English estate or interest. The will gives just such powers of dealing with the property comprehended in it as its words express, and no more".[2]

In cases to which the Hindu Wills Act[3] does not apply, a bequest to a class of persons some of whom are not in existence at the date of the testator's death is wholly void, and the fact that some of the class are then living and capable of taking will not allow the class to open out, and let in any after-born members of the class.[4]

[1] *Tagore* v. *Tagore*, 4 B. L. R., O. C. J., 187, per Peacock, C. J., *Lallubhai Bapubhai* v. *Mankuverbhai*, I. L. R., 2 Bom., 388.

[2] *Jankali* v. *Shibnath Chatterjee*, 2 B. L. R., O. C., 1. See *Sreemutty Dossee* v *Tarachurn Coondoo Chowdhry*, Bourke, Pt. VII, 48; *Kerodemoney Dossee* v. *Durgamoney Dossee*, I. L. R., 4 Cal., 455; S. C, 3 C. L R., 315; *Maniklal Atmaram* v. *Manchershi Dinsha*, I. L. R., 1 Bom., 369; *Lallubhai Bapubhai* v. *Mankuverbhai*, I. L. R., 2 Bom., 388.

[3] See s. 99 of the Indian Succession Act.

[4] *Khorodemoney Dossee* v. *Doorgamoney Dossee*, I. L. R., 4 Cal., 405, S. C., 3 C. L. R., 315. See *Tagore* v. *Tagore*, 9 B. L. R., 377; *Soudamoney Dossee* v. *Jogesh Chunder Dutt*, I. L. R., 2 Cal., 262.

LECTURE IV.

INDIAN SUCCESSION ACT—GENERAL CHARACTERISTICS OF WILLS.

Indian Succession Act, 1865—"Will" and "Codicil" how defined in that Act—Form of will immaterial—Requisites of valid will—*Animus testandi*—Will necessarily revocable—Document partly testamentary—Conditional Wills—Joint Wills—Mutual Wills—Instructions for will when treated as will—Incorporation of Documents in existence at date of will by reference—Admissiblity of evidence to show what papers constitute will—Incorporation of documents in existence at date of codicil—Testator cannot by will reserve power to dispose of property by subsequent unattested paper—Admission of papers to probate—Secret trusts—Language of will—Technical expressions not necessary—Testamentary capacity—Minors and Insane persons incapable of making wills—Lucid intervals—Onus in case of alleged incapacity—Delusions—Minority—Testamentary guardians—Married women—Hindu females—Capacity of Deaf, Dumb and Blind persons—Incapacity arising from old age—Sound disposing mind, what is—Incapacity caused by drunkenness or illness—Wills obtained by fraud, coercion or importunity—Undue influence—Words or clauses introduced by mistake or accident.

I come now to deal with testamentary disposition as it is regulated by the Indian Succession Act of 1865. We have seen that that Act applies to the following classes of persons :—

(1.) Europeans by birth or descent domiciled in British India.[1]

(2.) East Indians or persons of mixed European and Native blood.

(3.) Jews,[2] except in Aden where they have been exempted by notification under s. 332.[3]

(4.) Armenians.[4]

(5.) Parsees, in regard to testamentary succession.[5]

(6.) Native Christians and their Christian descendants.

(7.) Natives of India other than those comprised in the terms Hindu, Mahomedan and Buddhist, and not excluded under s. 332 of the Act.

[1] As to domicile, see Intestate and Testamentary Succession in India, pp. 8—19.

[2] *Gabriel* v. *Mordakai*, I. L. R., 1 Cal. 148; *S. E. Musleah* v. *E. E. Musleah*, 1 Boul., 234, *Musleah* v. *Musleah*, Fult. 450.

[3] Gazette of India, 1886, p. 707.

[4] See *Aratoon H. Aratoon* v. *C. Aratoon*, 7 Select Reports, 528; *Stephen* v. *Hume*, 1 Fult. 224, p. 242; *Aratoon* v. *Johannes*, Morton, (by Montrion) 19.

[5] Intestate Succession among Parsees is now regulated by Act XXXI of 1865.

[6] *Ponnusami Nandan* v. *Dorasami Ayyan*, I. L. R., 2 Mad. 209; *Joseph Vathiar*, 7 Mad. H. C. R., 121. See *Abraham* v. *Abraham*, 9 M. I. A., p. 239; *Admin.-General* v. *Anandachari*, I. L. R., 9 Mad., 466; *Tillis* v. *Saldanha*, I. L. R., 10 Mad., 69.

(8.) All Europeans in India not having an Indian domicile except in so far as the Act relates to the succession to moveable property.

A "will," according to the definition in the Indian Succession Act, means the legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death[1] and a "codicil" means an instrument made in relation to a will and explaining, altering or adding to its dispositions, and is considered as forming an additional part of the will.

The Indian Succession Act merely defines a will. It contains no provision as to the form or language of a will or the materials upon which, or the manner in which, it may be written. The form, therefore, of a paper does not affect its title to probate as a will, provided it was the intention of the deceased that the gifts or dispositions made by it should be dependent on his death.[2] The following documents have been held under various circumstances to be testamentary in their nature; a deed poll,[3] a deed of gift,[4] a bond,[5] marriage settlements,[6] drafts on bankers,[7] letters,[8] an assignment of a bond by endorsement,[9] and a promissory note.[10] In every case there must be an intention that the particular document should take effect as a will, as where it is referred to or treated as such. But, as we shall see, no document will be treated as a will unless it be executed according to the formalities required for the valid execution of a will,[11] and the dispositions are to take effect after the death of the person making them.[12] When the question is raised as to the testamentary character of a paper another test is whether it is revocable,[13] for it is an essential characteristic of a will that it should be revocable by the maker. The Indian Succession Act thus deals with the revocability of a will. "A will," it declares "is liable to be revoked or altered by the maker of

[1] Act X of 1865, s. 3.

[2] *Masterman* v. *Maberley*, 2 Hagg., 235; *In the goods of Morgan*, L. R., 1 P. and D. 214; *In the goods of Wemyss*, I. L. R., 4 Cal., 721; *Glynn* v. *Oglander*, 2 Hagg., 432; Williams on Executors, 105, 106; *Robertson* v. *Smith*, L. R., 2 P. and D. 43; *Habergham* v. *Vincent*, 2 Ves., 204, 231.

[3] *Peacock* v. *Monk*, 1 Ves. Sen., 127.

[4] *Thorold* v. *Thorold*, 1 Phill., 1.

[5] *Masterman* v. *Maberley*, 2 Hagg., 235.

[6] *Passmore* v. *Passmore*, 1 Phill., 218, per Sir John Nicholl.

[7] *Bartholemew* v. *Henley*, 3 Phill., 317; *In the goods of Marsden*, 1 Sw. and Tr., 542.

[8] *Habberfield* v. *Browning*, 4 Ves., 200 n.; *Denny* v. *Barton*, 2 Phill., 575.

[9] *Musgrave* v. *Down*, T. T., 1784, cited in 2 Hagg., 247.

[10] *Sabine* v. *Goate*, cited in 2 Hagg., 247.

[11] See *Robertson* v. *Smith*, L. R., 2 P. and D., 43.

[12] *Habergham* v. *Vincent*, 2 Ves., 204, 231; *In the goods of Morgan*, L. R., 1 P. and D., 214; *Cock* v. *Cooke*, ib., 241.

[13] *In the goods of Robinson*, L. R., 1 P. and D., 384. *In the goods of Coles*, L. R., 2 P. and D., 362.

it at any time when he is competent to dispose of his property by will."[1] Though a man purports to make his testament and last will irrevocable in the strongest and most express terms, yet he may revoke it, because his own act and deed cannot alter the judgment of law to make that irrevocable which is of its own nature revocable. A will is, therefore, said to be *ambulatory* until the death of the testator.[2] But a voluntary settlement for the benefit of others after the death of the settler, though it may reserve to him a life-interest and contain a power of revocation, is not testamentary.[3]

In the case of *In the goods of Robinson*,[4] there was an agreement for a 7 years' lease duly executed and attested by the witnesses, and containing a provision as to the application of the rent in the event of the lessor's death before the expiration of the lease, the lessee being beneficially interested in such application. It was contended that this portion of the document was testamentary, but the Court held that as it came into operation immediately upon its execution, and as no part of the agreement was revocable, it could not take effect as a will. If, however, a document is in part clearly testamentary such part will take effect as a will.[5]

A document, though formally executed as a will, will not be valid if there be no *animus testandi*, as if it were written in jest, or without any intention of making a valid will, evidence being admissible to show what the intention was.[6] Conversely, evidence is admissible to show that a deed or other instrument not on the face of it testamentary was intended to be so by the testator.[7] If there be proof either in the paper itself or from clear evidence *dehors*, firstly, that the executant intended to convey the benefit by it which would be conveyed if the paper were considered testamentary, and 2ndly, that death was the event to give it effect, then whatever be the form of the instrument it may be admitted to probate.[8] If there is nothing to show that an instrument is of a testamentary character to take effect with reference to the death of the person executing it, it cannot be allowed to operate as a will.[9]

A will may be testamentary only in the happening of a certain event, as if

[1] *Vinior's* case, 8 Co., 82 (*n*) Williams on Executors, p. 126.

[2] Act X of 1865, s. 49.

[3] *Tompson* v. *Browne*, 3 M. and K., 32.

[4] L R., 1 P. and D., 384.

[5] *Doe d. Cross* v. *Cross*, 8 Q. B., 714. See *Peacock* v. *Monk*, 1 Ves. Sen., 127.

[6] *Nicholls* v. *Nicholls*, 2 Phill. 180; Williams on Executors, 107; *Lester* v. *Smith*, 3 Sw. and Tr., 282.

[7] *King's Proctor* v. *Daines*, 3 Hagg., 221, p. 231; *Robertson* v. *Smith*, L. R., 7 P. and D. 43. *In the goods of Coles*, L. R., 2 P. and D. 362; *Cock* v. *Cooke*, L. R., 1 P. and D. 241.

[8] *King's Proctor* v. *Daines*, 3 Hagg., 221.

[9] *Glynn* v. *Oglander*, 2 Hagg., 428.

a testator were to bequeathe his property to C, "if I die of the particular illness of which I am now suffering and C survive me," and unless the event happen, the will does not take effect.[1] Where a testator executed a paper in which he made use of the following language: "Being obliged to leave England to join my regiment in China, I leave this paper containing my wishes. Should anything unfortunately happen to me whilst abroad, I wish everything I may be in possession of at that time, or anything appertaining to me hereafter, to be divided etc." The deceased returned to England from China, and it was held that the dispositions were dependent upon the death of the deceased in China, and that therefore the will itself was conditional.[2] It is to be observed, however, that a distinction is to be drawn between cases where the testator makes his will conditional upon the happening of his death within a particular period, and cases where the testator merely assigns the possibility of death during a particular period as the reason for making his will. In the latter class of cases the will is not contingent upon the death happening during the period.[3] In *In the goods of Mayd*,[4] a testator being about to travel, made his will which contained the following words: "On leaving this station for T. and M in case of my death on the way, know all men that this is a memorandum of my last will and testament, etc." and it was held that the will was not contingent upon his death before arriving at T. or M. So a will commencing with the words—"In case of any fatal accident happening to me being about to travel by Railway, I hereby leave etc." was held not to be contingent upon the event of the testator's death on the journey he was about to take at the time of the execution of the will.[5] If a will was clearly contingent upon an event which did not take place, no evidence is admissible of a subsequent adherence to the will to show that the testator intended that it should be operative after the time limited in the condition had expired,[6] as where a testator made a will containing the following passage: "Should anything happen to me on my passage to Wales, I leave all my goods etc."

There is nothing to prevent a man from saying that the question whether

[1] *Kapeenee Dossee* v. *Bisonath Ghose*, 2. In Jur. N. S., 6; *Roberts* v. *Roberts*, 2 Sw. and Tr. 337. See *In the goods of Mayd*, L. R., 6 P. Div., 17.

[2] *In the goods of Porter*, L. R., 2 P. and D. 22. See *In the goods of Robinson*, *ib.* 171. *In the goods of Lindsay*, *ib.* 459, were under similar circumstances wills were held to be conditional.

[3] *In the goods of Mayd*, L. R., 6 P. D. 17; *In the goods of Dobson*, L. R., 1 P. and D. 88. *In the goods of Martin*, L. R., 1 P. and D., 380.

[4] L. R., 6 P. D., 17.

[5] *In the goods of Dobson*, L. R., 1 P. and D. 88.

[6] *Roberts* v. *Roberts*, 8 Jur. N. S., 220.

or not a paper shall be operative or otherwise shall be dependent upon an event to happen after his death. He may give another person the option of deciding whether a testamentary instrument executed by him shall take effect or not. Thus, where a testator executed a codicil which concluded as follows: "I give my wife the option of adding this codicil to my will or not as she may think proper or necessary," it was held that the validity of the codicil depended on the assent of the wife.[1]

There seems to be this distinction in the consideration of papers which are in their terms dispositive and those which are of an equivocal character, that the first will be entitled to probate unless, as in the case of *Nicholls* v. *Nicholls*,[2] they are proved not to have been made *animo testandi*, whilst in the latter the *animus* must be proved by the persons claiming under them.[3]

It seems to have been considered at one time in England that a joint will was not valid,[4] but it is now settled that such a will is valid. A joint will is valid so far as regards the property of each testator and will ordinarily be entitled to probate on his death[5] unless it is to take effect on the death of all the joint testators,[6] in which case probate will be granted on the death of all. In *In the goods of Lovegrove*,[7] two sisters executed a will to the effect that the survivor should have all that remained of their property at the death of the first deceased, and that at the death of the survivor, it should be divided amongst certain relations. The survivor died without having revoked or altered the will and the Court granted administration with the will annexed as her will and testament. Like other wills, joint wills are revocable at any time by any of the executants, or by the survivor.[8] But in certain cases they will be enforced in equity, as compacts.[9]

In *Loffus* v. *Maw*,[10] the testator, who was advanced in years and in ill-health, induced his niece to reside with him as house-keeper, on the verbal representation that he would leave her certain property by his will, which he accordingly caused to be prepared and executed; but this will he subsequently

[1] *In the goods of Smith*, L. R., 1 P. and D. 717.

[2] 2 Phill, 180; see *supra*. p. 63.

[3] *Per* Sir H. Jenner Fust in *Griffin* v. *Ferrard*, 1 Curt. 100.

[4] *In the goods of Stracey*, Deane 6, 1 Jur. N. S. 1177.

[5] See *per Lord Mansfield*, 1 Co., p. 268.

[6] *In the goods of Raine*, 1 Sw. and Tr. 144. See *In the goods of Lovegrove*, 2 Sw. and Tr., 453.

[7] 2 Sw. and Tr. 453.

[8] *Hobson* v. *Blackburn*, 1 Addams, 278; *In the goods of Stracey*, Deane 6, 1 Jur. N. S 1197. *In the goods of Lovegrove*, 2 Sw. and Tr. 453.

[9] See *Dufour* v. *Pereira*, 1 Dick., 419; *Walpole* v. *Lord Oxford*, 3 Ves., 402, *Denyssen* v. *Mostert*, L. R., 4 P. C. 236; *Dias* v. *De Lievera*, L. R., 5 Ap. Ca., 123.

[10] 3 Giff., 592.

revoked by a codicil. The Court held, that, inasmuch as the niece had been induced to render valuable services to the testator on the faith of the representation made, the testator had no right to revoke the gift and directed the trusts of the will to be performed.[1]

Two persons may agree to make mutual wills, and the marriage of one will not revoke the will of the other.[2] Such wills may be revoked jointly or separately, provided the party revoking give notice to the other, but they become irrevocable after the death of one of them, if the other have taken advantage of the provisions made for him.[3] So two persons may execute one mutual will[4] but a mutual will is in effect two wills.[5]

A paper, not being *per se* of a testamentary character, but merely expressing an intention to instruct a solicitor to make a particular testamentary disposition, cannot operate as a will. But, instruments of the following descriptions, "heads of the will,"[6] "plan of a will,"[7] "sketch of any will,"[8] "notes of intended settlement,"[9] "instructions for a will," or "instructions to the solicitor,"[10] have been held, under certain conditions, to operate as testamentary acts provisionally, but in view of the execution of a more formal testamentary act afterwards.[11] In order, however, that instructions for a will, or memoranda or other similar informal documents, may be operative as a will itself, it is essential that the requisites as to signing and attesting should have been complied with. In such cases, where the character of the paper is on the face of it equivocal, the case is open to the admission of parol evidence of the testator's intention as to whether he meant the instrument as memoranda for a future disposition, or to execute it as a final will.[12]

A will may consist of several distinct papers or documents written and dated at different times.[13] So a will may refer to some deed or other document

[1] See *Jordan* v. *Money*, 5 H. L. C., 185; *Hammersley* v. *DeBeil*, 12 Cl. and Fin., 45.

[2] *Hinckley* v. *Simmons*, 4 Ves. 160; *Dias* v. *De Lievera*, L. R., 5 Ap. Ca., 123 P. C.; *Dennyssen* v. *Mostert*, L. R., 4 P. C., 236.

[3] *Dufour* v. *Periera*, 1 Dick., 419. See *Lord Walpole* v. *Lord Oxford*, 3 Ves. 402, p. 416.

[4] *Dennyssen* v. *Mostert*, L. R., 4 P. C., 236.

[5] *Dias* v. *De Lievera*, L R., 5 Ap. Ca., 123, P. C.

[6] *Bone* v. *Spear*, 1 Phill., 305; See *Castle* v. *Torre*, 2 Moo., P. C., 133; *Barwick* v. *Mullings* 2 Hagg., 225.

[7] *Mathews* v. *Warner*, 4 Ves. 186, 5 Ves. 23.

[8] *Hattatt* v. *Hattatt*, 4 Hagg., Ecc. 211.

[9] *Whyte* v. *Pollok*, L. R., 7 Ap. Ca., H. L., 400.

[10] *Whyte* v. *Pollok*, L. R., 7 Ap. Ca., H. L., 400, per Lord Selborne.

[11] *Whyte* v. *Pollok*, L. R., 7 Ap. Ca., H. L., 400.

[12] Williams on Executors, 111; see *Mathews* v. *Warner*, 4 Ves., 186; 5 Ves., 23.

[13] See *Marsh* v. *Marsh*, 1 Sw. and Tr., 528; *Birks* v. *Birks*, 4 Sw. and Tr. 23.

which is no part of, but may be incorporated with, it, if the deed or other document be clearly identified. By the Indian Succession Act, if a testator in a will or codicil refers to any other document then actually written as expressing any part of his intentions, that document is to be considered as forming a part of the will or codicil in which it is referred to.[1] This follows the English rule that a will or codicil duly executed may be made to take effect with reference to another instrument, which is then said to be incorporated with it, as where a testator devises all his lands which were conveyed to him by certain indentures.[2] It is really an example of the rule of evidence which allows a latent ambiguity in a document to be explained by parol evidence, or by extrinsic documents.[3] To come within the rule, the document, it is to be observed, must be in existence, that is, actually written, when the will is executed,[4] and must also be described as then existing.[5] In the case of *In the goods of Dallow*,[6] the will contained a reference to executors "hereinafter named," but it did not appoint executors. A clause appointing executors was written immediately after the testator's signature, and it was held that the reference in the will was not such a reference to the clause appointing executors as a document in existence at the time of the execution as to incorporate it, or to justify the Court in receiving parol evidence that it was written before the will was signed.

A memorandum written on the third side of a sheet of paper containing an invalid will to which it did not refer, and not described as being a codicil to such a will was held not to incorporate the will,[7] but has been held that a memorandum duly executed at the foot of a will and not expressly referring to it, but referring to something contained in it, incorporated the will.[8] Where a testator by a codicil referred to a gift as being contained in a list of gifts which he had previously deposited with his brother, the whole list was held to be incorporated by the reference in the codicil.[9]

[1] Act X of 1865, s. 51. This section applies to Hindus, etc.—Act XXI of 1870, s. 2.

[2] *Habergham* v. *Vincent*, 2 Ves., 204; *In the goods of Gill*, L. R., 2 P. and D. 6. See *Burton* v. *Newbery*, L. R., 1 Ch., Div., 238; per Jessel, M. R. *In the goods of Daniell*, L. R., 8 P. D., 14.

[3] *Dillon* v. *Harris*, 4 Bligh, N. S., 358, per Lord Brougham.

[4] *Countess Ferraris* v. *Ld. Hertford*, 3 Curt., 468. *In the goods of Watkins*, L. R., 1 P. and D., 19. *In the goods of Dallow*, L. R., 1 P. and D., 189; *In the goods of Sutherland*, *ib*, 198; *Singleton* v. *Tomlinson*, L. R. 3 Ap. Cas. 409.

[5] *Ibid.*

[6] L. R., 1 P. and D., 189.

[7] *In the goods of Drummond*, 2 Sw. and Tr. 8. See *In the goods of Willmott*, 1 Sw. and Tr. 36.

[8] *In the goods of Terrible*, 1 Sw. and Tr. 140. See *In the goods of Widdrington*, 35 L. J., Prob., 66. See also *Guest* v. *Willasey*, 3 Bing. 614.

[9] *In the goods of Daniel*, L. R., 8 P. D. 14.

The Court has allowed the will of another person,[1] the revoked will of another person,[2] a deed,[3] a list of plate written on the same sheet as the will,[4] to be incorporated.[5]

Questions frequently arise as to what papers constitute the will of the testator. In *Gould* v. *Lake*,[6] it was held that statements of a testator, whether made before or after the execution of the will, were admissible to show what papers constitute the will. There the question was whether an appointment of executors and the nomination of one of them as the residuary legatee, which were contained in the first page of the outer sheet of the will, formed part of the will, the will itself being written on the inner sheets. The words "see over" with an asterisk in the body of a will were held, in another case, to incorporate a sentence on the second sheet on which was another asterisk, the will itself being written and signed on the first sheet.[7] The sentence was treated as in the nature of an interlineation.

In all cases of incorporation the identity of the paper intended to be incorporated must be established.[8] Unless it is clearly identified with the description of it given in the will, and has been shown to have been in existence at the time the will was executed, it cannot be taken as part of the will.[9] Both these matters must be established, and though there may be no doubt as to the former, unless the latter is proved, there can be no incorporation of the paper with the will.[10] Where the identity of the paper cannot be disputed, and the will refers to it as in existence, it will be presumed that the paper was in existence at the time of the executon of the will.[11] A codicil duly executed, it seems, will give effect and operation to unexecuted papers which have been written between the periods of the execution of the will and codicil, although the latter does not refer to the former, as where the testator by his will bequeathed articles of plate "specified in schedules A and B to be annexed to this document.[12]

[1] *In the goods of Darby*, 10 Jur., 164.

[2] *In the goods of Countess of Durham*, 3 Curt., 57.

[3] *In the goods of Dickens*, 3 Curt. 60.

[4] *In the goods of Lesh*, 2 Jur., N. S., 526.

[5] See Agnew, State of Frauds, p. 546.

[6] L. R., 6 P. and D., 1. See *Sugden* v. *Lord St. Leonards*, L. R., 1 P. Div., 154.

[7] *In the goods of Burt*, L. R., 1 P. and D., 214.

[8] *Allen* v. *Maddock*, 11 Moore's P. C., 427. See *Smart* v. *Prujean*, 6 Ves., 565; *Singleton* v. *Tomlinson*, L. R., 3 Ap. Ca., 404.

[9] *Singleton* v. *Tomlinson*, L. R., 3 Ap. Ca., 404.

[10] *Ibid.*

[11] *In the goods of Ash*, 2 Jur., N. S., 526.

[12] *In the goods of Hunt*, 2 Rob., 622; Williams on Executors, 228. See *In the goods of Lancastee*, 29 L. J., Prob. 155.

Where the deceased executed a will in India which he deposited in a bank there, and subsequently, in England, executed a codicil which contained the following clause,—"of which will I, along with the codicil thereto, execute a copy and homologate and confirm the same in all particulars, except so far as altered or revoked by this codicil;" and at the time of the execution of the codicil the deceased produced a paper which he informed the witnesses was a copy of his will, it was held that the copy produced was incorporated in the codicil.[1]

If the terms of reference in a will are not sufficiently precise, parol evidence is admissible to identify the paper referred to. Thus in *Allen* v. *Maddock*,[2] an unattested will was held to be incorporated in a duly executed codicil, which was headed—"This is a codicil to my last will and testament," no other will having been found. In that case the doctrine of incorporation was very fully discussed by the Privy Council. In another case, however, in the same year, Sir Cresswell Cresswell, who was one of the Judges in the case of *Allen* v. *Maddock*, and entirely concurred in the judgment, said that the principle of incorporation as there laid down by the Privy Council was not to be extended.[3]

In *In the goods of Heathcote*,[4] a married woman made a will which was invalid, but afterwards when a widow, she executed upon the same paper as the invalid will a document which began with the words "This is a codicil to the last will and testament of me" and it was proved that she left no other will. The Court held that the will was incorporated and both documents were therefore admitted to probate. In another case,[5] probate was granted of two instruments called respectively "the last will and testament" the later will not containing a revocatory clause, but this, of course, was not on the ground that there was any incorporation.

Where a testator by his will "ratified and confirmed" a particular deed, it was held that he had sufficiently shewn his intention to make it part of his will, and the deed was accordingly taken as incorporated.[6]

A document described as "the third codicil to my will" was held not to be incorporated by a codicil of a subsequent date by the words therein "this is the fourth codicil to my will."[7]

In *In the goods of Mathias*,[8] the testatrix, by her will, requested her trinkets to be divided "as I shall direct in a small memorandum." On her death, the

[1] *In the goods of Mercer*, L. R., 2 P. and D., 91.

[2] 1 Moore's P. C., 427,

[3] 1 Sw. and Tr., 250.

[4] L. R., 6 P. and D., 30.

[5] *In the Goods of Petchill*, L. R., 3 P. and D., 153.

[6] *Sheldon* v. *Sheldon*, 1 Rob., 81; *In the Goods of Harris*, L. R., 2 P. and D., 83.

[7] *Stokhil* v *Punshon*, L. R., 6 P. and D., 9.

[8] 3 Sw. and Tr., 100.

will and two codicils, and a paper headed "Memorandum of trinkets referred to in my will" were found folded together in a locked portfolio. There was no evidence to show that the memorandum was in existence at the time it was executed, but there was evidence from which it might be inferred that it was in existence before the date of the last codicil, but that codicil did not refer to it. Sir C. Cresswell held that the re-execution of the will by the last codicil could not make that a part of the will, which was no part of it before. That case, however, and the other authorities on the point were subsequently discussed by Lord Penzance in another case[1] where the testatrix by her will dated 15th September 1865 bequeathed "all such plate and plated articles as are contained in the inventory signed by me and deposited herewith." The will was deposited with the testator's bankers in an envelope with an endorsement in her writing, and in the same envelope was found an inner envelope containing a list of plate. The list, which was on several sheets, was headed "List of plate and plated articles left by my will dated the 15th September 1865" and it was signed by the deceased in several places, and on the last sheet was her signature, and the date 21st September 1865. Affidavits were filed shewing that the will and list were deposited on the 21st September 1865, and that a codicil dated the 10th October 1865 was deposited subsequently. It was also proved that the testatrix had intimated her intention of signing the inventory and depositing it with her will. It was said that, although the republication of a will by a codicil would not of itself entitle an unexecuted paper written or signed between the date of the will and the date of the codicil to probate, yet where the will, if read as speaking at the date of the execution of the codicil, contained language which would operate as an incorporation of the document to which it refers, such document, although not in existence until after the execution of the will, is entitled to probate by force of the codicil. Applying that principle to the case before him, Lord Penzance held that the words in the will referring to the inventory appeared to refer with sufficient distinctness to a document then existing. "If the proposition" he said "laid down by the learned judge in *In the goods of Mathias* is a general one, that decision cannot be supported. I think that the proposition is not a general one, but must be read in reference to the case to which it refers."

A codicil which refers to a will of a particular date and does not refer to a subsequent codicil does not operate as a republication of the subsequent codicil.[2]

A testator cannot directly or indirectly reserve power to himself in a will

[1] *In the Goods of Lady Truro*, L. R., 1 P. and D., 201.

[2] *Burton* v. *Newbery*, L. R., 1 Ch. Div., 234; dissenting from *Gordon* v. *Lord Reay*, 5 Sim., 274.

duly executed to dispose of property by a subsequent unattested instrument.[1] Such a case stands in a very different footing from the case in which a testator by reference to an existing document is held to incorporate that document. Where, however, a disposition of property is complete, the gift will be effectual, although it might be necessary for the testator to do some future act to distinguish the legatee, as, in the case of *Stubbs* v. *Sargon*,[2] where the devise was to "the persons who shall be in copartnership with me at the time of my decease, or to whom I shall have disposed of my business."

It does not follow that because papers are incorporated in the will they must be included in the probate.[3] Thus, where the document referred to was a deed in the hands of trustees, who refused to produce it, probate was granted of the will alone.[4] Where two documents are referred to, but only one is found, effect will be given to that.[5] Where a will and codicil have been in existence, and the will has been revoked, probate of the codicil will not be granted, unless the Court be satisfied that it was intended to operate separately.[6]

Where a will contains a bequest to a person and it appears that a trust was intended, but the nature of the trusts is not disclosed, evidence of the trusts may be given if they have been communicated at or before,[7] or subsequently,[8] to the making of the will.[9]

In *Riardon* v. *Banon*,[10] a will directed a pecuniary legacy to be disposed of by the legatee in a manner of which he alone could be cognizant and as contained in a memorandum which the testator would leave with him. It was proved by parol evidence that before the execution of the will, the testator had verbally informed the legatee that he intended to bequeath the legacy in trust for a person whom he then named, and that the legatee had consented to accept the legacy for this purpose and had promised the testator to carry out his wishes respecting it. The residuary legatees having claimed the benefit of the legacy, it was held by the Vice-Chancellor that a vailid trust for the person named by the testator had attached to the bequest. It was also held that parol evidence was admissible to prove that a legacy had been bequeathed upon

[1] *Habergham* v. *Vincent*, 2 Ves., 204; *Johnson* v. *Ball*, 5 De. G. and S., 65; See *Sidgreaves* v. *Brewer*, L. R., 15 Ch. D., 594.

[2] 3 M. and C., 507.

[3] *Sheldon* v. *Sheldon*, 11 Moore's P.C., 427; (S. C.), 1 Rob., 81.

[4] *In the goods of the Sibthorp*, L. R., 1 P. and D., 106.

[5] *Dickenson* v. *Stidolph*, 11 C. B., N. S., 341.

[6] *In the Goods of Grieg*, L. R., 1 P. and D., 72; see *In the Goods of Savage*, L. R., 2 P. and D., 78.

[7] *Riordon* v. *Banon*, 10 Ir. Eq., Rep. 649; cited 15 Ch. D., p. 606.

[8] *Moss* v. *Cooper*, 1 J. and H., 367.

[9] See *In re Fleetwood*, *Sidgreaves* v *Brewer*, 15 Ch. Div., 594.

[10] 10 Ir. Eq., Rep. 649, cited 15 Ch. Div., p. 606

a trust entirely or partially undisclosed upon the face of the will, when, at or before the execution of the will, the trust had been communicated by the testator to the legatee and had been accepted by the latter. Referring to the cases the Vice-Chancellor said, "The result of the cases appears to me to be that a testator cannot by his will reserve to himself the right of disposing subsequently of property by an instrument not executed as required by the statute or by parol, but that when at the time of making his will he has formed the intention that a legacy thereby given shall be disposed of by the legatee in a particular manner not thereby disclosed, but communicated to the legatee and consented to by him at or before the making of the will, or probably, according to *Moss* v. *Cooper*, (1 J. and H., 367), subsequently to the making of it, the Court will allow such trust to be proved by admission of the legatee or other parol evidence, and will, if it be legal, give effect to it. The same principle which led this Court, whether wisely or not, to hold that the Statute of Frauds and the Statute of Wills were not to be used as instruments of fraud, appears to me to apply to cases where the will shows some trust was intended, as well as to those where this does not appear upon it. The testator, at least when his purpose is communicated and accepted by the proposed legatee, makes the disposition to him on the faith of his carrying out his promise, and it would be a fraud in him to refuse to perform that promise."[2]

The trusts must be communicated to the trustee in the life-time of the testator.[3] Where on the face of the will a legatee is a trustee, but the trusts are not thereby disclosed, it is clear that no trust not communicated and assented to by the legatee but afterwards declared by a paper not executed as a will, could be binding.[4] In such a case the legatee would be a trustee for the next of kin. There is, however, a well known class of cases where no trust appears on the face of the will, but the testator has been induced to make the will, or, having made it has been induced not to revoke it by a promise on the part of the devisee or legatee to deal with the property or some part of it in a specified manner. In those cases the Court has compelled discovery and performance of the promise, treating it as a trust binding the conscience of the donee, on the ground that otherwise a fraud would be committed, because it is to be presumed that if it had not been for such promise the testator would not have made, or would have revoked, his gift. The principle is precisely the same as in the case of an heir who has induced a testator not to make a will devising the estate

[1] See *Habergham* v. *Vincent*, 2 Ves. *Jun.* 204; *Countess Ferrars* v. *Lord Hartford*, 3 Curst., 468.

[2] See *In re Fleetwood, Sidgreaves* v. *Brewer*, L R., 15 Ch. Div., 594.

[3] *In re Boyes : Boyes* v. *Carritt* M. R, 20 Ch. Div., 531.

[4] See *Johnson* v. *Bull*, 5 De G. and Sm., 85; *Briggs* v. *Penny*, 3 Mac. and G., 346; *Singleton* v. *Tomlinson*, L. R., 3 Ap. Ca., 404; *In re Boyes : Boyes* v. *Carritt*, L. R., 26 Ch. Div., 531.

away from him, by a promise that if the estate were allowed to descend, he would make certain provisions out of it for a person named.[1]

Where there is a bequest to two persons as tenants in common, with a secret trust communicated to one of them only, the gift to the other is not void, even if the secret trust be proved, though it would have been so in the case of joint tenants[2].

If a secret trust is alleged it must be distinctly and clearly shown that the person whom it is sought to convert into a trustee acted *malo animo*.[3] So the onus is on those alleging it to prove that a trust for charity was communicated to, and expressly or tacitly accepted by the devisees.[4]

The Indian Succession Act, as I have said, does not contain any provision as to the particular language of a will or the manner in which it may be written. It is therefore immaterial in what language a will is written.[5] It may be written, or partly written, in pencil.[6] If the part of a will written in pencil appears to be deliberative only, as where queries are placed in the margin, that part must be omitted from the probate.[7] And, *primâ facie*, the presumption is that alterations made in pencil are deliberative; in ink, final.[8]

If a paper be superscribed 'Heads of a Will,' or 'Plan of a Will,' &c., the inference, we have seen,[9] from this would be that it was a paper from which it was intended that a more formal will should be drawn out, yet, in a case where such an instrument was dated, signed, and endorsed 'intended will,' and alterations in it afterwards made in a formal manner, and the deceased declared upon being taken ill that he had written the heads of his will and signed it, and that that would do very well, the paper was established as a will.[10]

As to the wording of a will, the Indian Succession Act, following the rule laid down by Lord Kenyon in *Hay* v. *Coventry*,[11] declares that it is not necessary that any technical words or terms of art should be used in a will, but only that the wording shall be such that the intentions of the testator can be known there-

[1] *Stickland* v. *Aldridge*, 9 Ves. 516; *Walgrave* v. *Tebbs*, 2 K. and J., 313; *McCormick* v. *Grogan*, L. R., 4 H. L., 82; *Jones* v. *Badley*, L. R., 3 Ch. Ap., 362; see *In re Boyes: Boyes* v. *Carritt*, L. R., 26 Ch. Div., 531.

[2] *Rowbotham* v. *Dunnett*, L. R., 8 Ch. Div., 430.

[3] *McCormick* v. *Grogan*, L. R, 4 H. L., 82, p. 97.

[4] *Jones* v. *Badley*, L. R., 3 Ch. Ap., 362.

[5] Williams on Executors, p. 113; See *Reynolds* v. *Kortright*, 18 Beav. 417.

[6] *Bateman* v. *Pennington*, 3 Moore's P.C., 223.

[7] *In the goods of Hall*, L. R., 2 P. and D., 256; *In the goods of Adams*, *ib.*, 367.

[8] *Hawkes* v. *Hawkes*, 1 Hagg, 321; Williams on Executors, 112.

[9] Ante p. 66 and cases there cited.

[10] *Bone* v. *Spear*, 1 Phill, 350; Williams on Executors, p. 110.

[11] 3 T. R, 86.

from.[1] It is, however, a rule of construction, as we shall find later in dealing with the construction of wills, that if technical words are used, they are to be construed according to the technical sense, unless upon the whole it is plain that the testator did not so intend.[2]

The next point which I propose to discuss is the testamentary capacity which is necessary to the making of a valid will. Under the Indian Succession Act every person of sound mind and not a minor may dispose of his property by will.[3] In England formerly alien friends or such as were at peace with England might make wills to dispose of their personal estate, but alien enemies, unless they had the King's license, express or implied, to remain in England, were incapable of making any testamentary disposition of their property.[4] Now in England by s. 2 of the Naturalization Act, 1870[5] an alien has power to take, acquire, hold and dispose of both real and personal property in the same manner in all respects as a natural born British subject. Under s. 46 of the Indian Succession Act, it would seem, that aliens, whether friends or enemies, if not disqualified by reason of mental capacity or minority, may dispose of property of every description by will.[6] In England, at one time, the personal property of a *felo de se* was forfeited to the Crown; but now forfeiture is abolished by 33 and 34 Vict. c. 23, except in the case of outlawry.[7] Under the Indian Succession Act, not only a *felo de se*, but a convicted criminal, may make a will.[8]

A testator at the time of making his will must be fully cognizant of its contents, and be in a condition to exercise, and must in fact exercise thought, judgment and reflection respecting the act he is doing.[9] In a case where a testator executed a will on his deathbed in favour of his wife to the exclusion of the other members of his family, and it was alleged he was of weakened and impaired capacity, the Privy Council expressed an opinion that in order to constitute a sound disposing mind a testator in such a case must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of his property and the nature of the claims of others whom by his will he is excluding from all participation in that property, and that the protection of the law is in no cases more needed than it is in those cases where the mind has been too much

[1] Act X of 1865, s. 61. This section applies to Hindus, etc. under Act XXI of 1870.

[2] *Per* Lord Alvanley in *Thellusson* v. *Woodford*, 4 Ves., 329.

[3] S. 46. This section applies to Hindus etc. under Act XXI of 1870.

[4] Williams on Executors, 13.

[5] 33 Vict. c. 14.

[6] See *Mayor of Lyons* v. *E. I. Co.*, 1 Moore's P. C., 175.

[7] See 42 and 43 Vict. c. 59, s. 3.

[8] See *In the goods of Baldley*, 31 L. J., Prob., 178

[9] *Dufaur* v. *Croft*, 3 Moore's, P. C., 136.

enfeebled to comprehend more objects than one, and most especially when that one may be so forced upon the attention of the invalid as to shut out all others that might require consideration, and then the question, as in the case before the Judicial Committee, was not whether the testator knew, when he was giving all his property to his wife and excluding all other relations from a share in it, but whether he was at that time capable of recollecting, who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property.[1]

A lunatic usually mad but having intervals of reason cannot, during his insanity make a will,[2] but during the intervals of reason he may make a valid testament,[3] appointing executors and disposing of his goods at pleasure.[3] An idiot, that is, a fool or madman from his nativity, who has never had any lucid intervals is, of course, incapable of making a will.[4] It must be borne in mind that if a testator make a will while in a state of unsound mind, the will does not, upon his subsequently recovering his understanding, become operative, unless the testator after having regained his sound reason republish it as his will.[5]

If a person impeach the validity of a will on account of the supposed incapacity of the testator, it will be incumbent on him to establish such incapacity by the clearest and most satisfactory proofs. The burden of proof rests upon the person attempting to invalidate what on its face purports to be a legal act. In other words, sanity must be presumed, till the contrary is shown.[6] In the case of *Banks* v. *Goodfellow*,[7] it appeared that the testator made a will in 1863; he had been confined as a lunatic for some months in 1841, and he remained subject to delusions that he was personally molested by a man who had long been dead, and that he was pursued by evil spirits whom he believed to be visibly present; and these delusions were shown to have existed between 1841 and the date of the will and also between that date and his death in 1865. As to the testator's general capacity to manage his affairs etc. the evidence was contradictory, but it was admitted that at times he was capable of making a

[1] *Harwood* v. *Baker*, 3 Moore, P. C. 282, p. 290.

[2] Williams on Executors, 19.

[3] Act X of 1865, s. 46, Expl. 3 which applies to Hindus, etc., under Act XXI of 1870. Williams on Executors, 21; *Cartwright* v. *Cartwright*, 1 Phill., 100; *Waring* v. *Waring*, 6 Moore's P. C., 341; *Nichols* v. *Binns*, 1 Sw. and Tr., 239.

[4] Williams on Executors, 17.

[5] See Williams on Executors, 229.

[6] *Groom* v. *Thomas*, 2 Hagg., 434; *Smee* v. *Smee*, L. R., 5 P. D., 84; *Murfett* v. *Smith*, 12 P. Div., 116; *Banks* v. *Goodfellow*, L. R., 5 Q. B., 549; *Jenkins* v. *Morris*, L. R., 14 Ch. D., 674; Williams on Executors, 20.

[7] L. R., 5 Q. B., 549.

will. The Jury was directed to consider whether at the time of making the will, the testator was capable of having such a knowledge and appreciation of facts, and was so far master of his intentions and free from delusions as would enable him to have a will of his own in the disposition of his property and to act upon it; and they were further directed that the mere fact of the testator being able to recollect things or to converse rationally on some subjects, or to manage some business, would not be sufficient to show that he was sane, while, on the other hand, slowness, feebleness and eccentricities would not be sufficient to show he was insane, and that the whole burden of showing that the testator was fit at the time, was on the party claiming under the will. It was held that the direction to the Jury was practically right, for that it was immaterial whether the delusions remained latent or not at the time, if the testator was otherwise competent to make a will, as neither of the delusions—the dead man being in no way connected with the testator,—had, or could have had, any influence upon him in disposing of his property. In cases, such as that of *Dew* v. *Clark*,[1] where the insane delusion had a direct bearing on the provisions of the will, the delusion being once proved, and its connection with the will being manifest, there is no difficulty in setting aside the will.

Previous to the case of *Banks* v. *Goodfellow*,[2] it was considered,[3] that if a man's mind was unsound in one particular, the mind being one and indivisible, his mind was altogether unsound, and that therefore he could not be held capable of performing rationally such an act as the making of a will.[4] In the case of *Smee* v. *Smee*,[5] it was laid down that if the delusions could not reasonably be conceived to have had anything do with the deceased's power of considering the claims of his relations upon him and the manner in which he should dispose of his property, then the presence of a particular delusion would not incapacitate him from making a will. The mere existence, however, of a delusion in the mind of a person making a disposition is not sufficient to avoid it, even though the delusion is connected with the subject matter of such disposition. It is a mere question of fact whether the delusion did or did not affect the disposition.[6] Accordingly, where a man is subject to delusions which are compatible with the retention of the general powers and faculties of the mind, such delusions will not be sufficient to overthrow the will, unless they were such as were calculated to influence the testator in making it.

[1] 3 Add., 79.

[2] L. R., 5 Q. B., 549.

[3] *Waring* v. *Waring* 6 Moore's, P. C., 341; *Smith* v. *Tebbitt*, L. R., 1 P. and D., 398.

[4] See *Smee* v. *Smee*, L. R., 5 P. D., 84, p 90; *Jenkins* v. *Morris*, L. R., 14 Ch. D., 674, p. 680.

[5] L. R., 5 P. D., 84.

[6] *Jenkins* v. *Morris*, L. R., 14 Ch. D., 674.

In the case of *Banks* v. *Goodfellow*,[1] to which reference has already been made, Cockburn, C. J., said—"The law of every civilized people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given. The instincts and affections of mankind, in the vast majority of instances, will lead men to make provision for those who are the nearest to them in kindred and who in life have been the objects of their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest relatives the property which he possessed. The same motives will influence him in the exercise of the right of disposal when secured to him by law. Hence arises a reasonable and well-warranted expectation on the part of a man's kindred surviving him, that on his death his effects shall become theirs instead of being given to strangers. To disappoint the expectation thus created and to disregard the claims of kindred to the inheritance is to shock the common sentiments of mankind, and to violate what all men concur in deeming an obligation of the moral law. It cannot be supposed that, in giving the power of testamentary disposition, the law has been framed in disregard of these considerations. On the contrary, had they stood alone, it is probable that the power of testamentary disposition would have been withheld, and that the distribution of property after the owner's death would have been uniformly regulated by the law itself. But there are other considerations which turn the scale in favour of the testamentary power. Among those, who, as a man's nearest relatives, would be entitled to share the fortune he leaves behind him, some may be better provided for than others; some may be more deserving than others; some, from age, or sex, or physical infirmity, may stand in greater need of assistance. Friendship and tried attachment, or faithful service, may have claims that ought not to be disregarded. In the power of rewarding dutiful and meritorious conduct, paternal authority finds a useful auxiliary; age secures the respect and attentions which are one of its chief consolations. As was truly said by Chancellor Kent, in *Van Alst* v. *Hunter*,[2] 'It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities.' For these reasons the power of disposing of property in anticipation of death has ever been regarded as one of the most valuable of the rights incidental to property, while there can

[1] L. R., 5 Q. B., p. 563.

[2] 5 Johnson, N. Y., Ch. Rep., p. 159.

be no doubt that it operates as a useful incentive to industry in the acquisition of wealth, and to thrift and frugality in the enjoyment of it. The law of every country has therefore conceded to the owner of property the right of disposing by will either of the whole, or, at all events, of a portion, of that which he possesses. The Roman law, and that of the Continental nations which have followed it, have secured to the relations of a deceased person in the ascending and descending line a fixed portion of the inheritance. The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances caprice, or passion, or the power of new ties, or artful contrivances, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law."

It is now settled law that the mere existence of a delusion is not sufficient to deprive a man of testamentary capacity,[1] even if the delusion is connected with the subject matter of the disposition. It is a question of evidence whether the delusion affected the disposition.[2] The law does not say that a man is incapacitated from making a will if he proposes to make a disposition of his property moved by capricious, frivolous, mean or even bad motives. Every one is left free to choose the person upon whom he will bestow his property after death, entirely unfettered in the selection he may think proper to make. He may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and effect must be given to his will, however much the course he has pursued may be condemned.

A man may take an unduly harsh view of the character of his children, but there is a limit beyond which one feels that it ceases to be a question of harsh unreasonable judgment of character, and that the repulsion which a parent exhibits towards one or more of his children must proceed from some mental defect in himself. There is a point at which such repulsion and aversion are themselves evidence of unsoundness of mind.[3]

As to the proof of lucid intervals great care must be exercised. "It is scarcely possible," said Sir John Nichol,[4] "to be too strongly impressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval. In some cases where the testator has been of unsound mind,

[1] *Broughton* v. *Knight*, L. R., 3 P. and M., 64; *Smee* v. *Smee*, 49 L. J., P. and M., 8; *Jenkins* v. *Morris*, L. R., 14 Ch. D., p. 680.

[2] *Jenkins* v. *Morris*, L. R., 14 Ch. D., p. 674.

[3] *Broughton* v. *Knight*, L. R., 3 P. and D., 64; *per* Hannen, *J.*

[4] *White* v. *Driver*, 1 Phill., 88.

where the act was not only done and completed by the testator himself but the will was proper and natural, the Courts have treated the will as made in a lucid interval.[1] If general lunacy is once established the party alleging a lucid interval must establish, not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficient to enable the testator to judge of the act.[2]

A minor under the Indian Succession Act is a person who has not have completed the age of 18 years.[3] By the Indian Majority Act, IX of 1875, s. 2, it is enacted that every minor of whose person or property a guardian has been, or shall be appointed by any Court of Justice, and every minor under the Court of Wards shall, notwithstanding anything contained in the Indian Succession Act or in any other enactment, be deemed to have attained his majority when he shall have completed the age of 21 years and not before, but that, subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed the age of 18 years and not before.[4] The age of majority under Act XL of 1858, is also 18 years (S. 26). The Indian Succession Act is silent as to how the age is to be computed. In England, in computing the age of a person for testamentary or other purposes, the day of the birth is included; thus, if he were born on the 16th January 1800, he would have attained his age of majority, (*i. e.*, of 21 years) on the 15th January 1821, and as the law does not recognize fractions of a day, the age would be attained at the first instant of the latter day.[5] So under the Indian Majority Act in computing the age of any person, the day on which he is born is to be included as a whole day.[6]

The definition of a minor in the Indian Succession Act has been made applicable to Hindus to whom the Hindu Wills Act applies.[7] Long prior to the passing of the latter Act it had been held that a Hindu being a minor was incapable of making a will.[8]. Under Hindu law (as we have seen[9]) minority terminated at the age of sixteen years, but now, in all cases to which the Hindu Wills Act is applicable, no person who has not completed the age of 18 is competent to make a will.

Although a minor may not dispose of his property by will,[10] a father,

[1] See *Cartwright* v *Cartwright*, 1 Phill, 90; *Scruby* v *Fordham*, 1 Add, 90.

[2] *Hall* v. *Warren*, 9 Ves. 605, p. 611.

[3] Act X of 1865, s. 3

[4] See *Raj Coomar Roy* v. *Alfuzuddin Ahmed*, 8 C. L. R., 419, *Stephen* v. *Stephen*, L R, 8 Cal, 714, (S. C) 10 C L R, 533.

[5] 1 Jarm., 45, 4th edition.

[6] Act IX of 1875, s 4.

[7] Act XXI of 1870, s. 6.

[8] *Cossinath Bysack* v *Hurrosoondery*, 3 Morley's Dig, 198

[9] *Supra*, p 17

[10] Act X of 1865, s 16 This section applies to Hindus, etc under Act XXI of 1870

whatever his age may be, may by will appoint a guardian or guardians for his child during minority.[1] In England, this power to appoint guardians of their infant children by will was given to minors by 12 Car. II, c. 24, s. 8. That power was, however, taken away, it seems, though not expressly, by s. 7 of the Wills Act, 1 Vict., c. 26.[2] In England a testamentary guardian of minor children is entitled to a grant of administration for their use and benefit before all others.[3] The next in order is the guardian of the estate (not the person) of a minor appointed by the High Court of Chancery, or a guardian appointed by a competent foreign Court. If there be no such guardian, the Court itself will appoint a curator or guardian from the next-of-kin of the minor for the purpose of taking the grant.[4]

Where two or more persons are appointed testamentary guardians the office survives although there are no express words of survivorship in the clause of the appointment.[5]

Explanation I to s. 46 of the Indian Succession Act declares that a married woman may dispose by will of any property which she could alienate by her own act during her life. This provision is in accordance with the civil law, according to which a married woman was capable of bequeathing as a *feme sole*.[6]

Prior to the Married Woman's Property Act, 1882, which gave a married woman power to dispose by will of any real or personal property as her separate property as if she were a *feme sole*, a married woman in England, except in certain cases, had no power to make a will. Being excepted from the operation of the Statute of Wills, 34 and 35 Hen. VIII, c. 5, she was incapable of devising lands, and she was also incapable of making a testament in respect of chattels without the licence of her husband,[7] and the Wills Act, 1 Vict., c. 26, made no alteration in the law with respect to the testamentary capacity of a *feme covert*.[8] She might make a will as to property to which she was entitled in *autre droix* as executor, and could appoint an executor for the purpose of continuing the representation to the original testator.[9] She might

[1] Act X of 1865, s. 47. This does not apply to Hindus, etc.

[2] As to power of an infant to appoint guardian of his children, see *Morgan* v. *Hatchell*, 19 Beav., 86.

[3] *In the goods of Morris*, 2 Sw. and Tr., 360.

[4] *Eyre* v. *Shaftesbury*, 2 P. Wms., 102.

[5] *Rich* v. *Chamberlayne*, 1 Lee, 135; *In the goods of Ewing*, 11 Hagg., 381; Coote's Prob. Pract., 129, 130.

[6] 2 Blackstone's Commentaries, 497.

[7] See *Willock* v. *Noble*, L. R., 8 Ch, 778, 7 H. L., 580.

[8] Williams on Executors, p. 51.

[9] *Scammell* v. *Wilkinson*, 2 East, 552. *In the goods of Richards*, L. R, 1 P. and D., 156 Williams on Executors, p. 54.

also make a will in pursuance of an agreement made before marriage or by virtue of a power.[1] So she might dispose of personal property and of the beneficial interest in real estate settled to her separate use,[2] and also of her savings out of alimony.[3]

Under s. 4 of the Indian Succession Act, no person to whom the Act applies, acquires by marriage any interest in the property of the person whom he or she marries, nor becomes incapable of doing any act in respect of his or her own property which he or she could not have done if unmarried.[4]

The testamentary power of a Hindu female, we have seen,[5] over her *stridhan* is commensurate with her power over it in her lifetime. But she has no power to bequeath property which she inherits from males, or property in which she has only a limited interest.[6] Section 46 of the Indian Succession Act has been made to apply to Hindus by s. 2 of the Hindu Wills Act, 1870. Accordingly, a Hindu married woman may by will dispose of whatever property she might have disposed of during her lifetime. I have already referred[7] to the question which has been raised, but which apparently has not been decided, as to the right of a Hindu widow to make a devise in respect of accumulations arising from the estate of her husband in her hands, which she may have evinced an intention to keep separate from her husband's estate. There appears to be no reason, as I have endeavoured to show, why it should not be held that a Hindu widow should have this limited power of devise in respect of accumulations from the income of her husband's estate.

Persons who are deaf, or dumb, or blind are not thereby incapacitated from making a will if they are able to know what they do by it.[8]

In England one who is deaf and dumb from his nativity is, in presumption of law, an idiot, and therefore incapable of making a will, but the presumption is one which, of course, may be rebutted.[9] Old age alone does not deprive a man

[1] *Tucker* v. *Inman*, 4 M. and Gr., 1077; Williams on Executors, p. 56; *Burnett* v. *Mann*, 1 Ves., Sen. 156; *Hawksley* v. *Barrow*, L. R., 1 P. and D., 147; *Dever* v. *Thompson*, 4 Taunt., 294; *Willock* v. *Noble*, L. R., 7 H. L., 580.

[2] *Taylor* v. *Meads*, 11 Jur., N. S., 166; *Pride* v. *Bubb*, L. R., 7 Ch., 64.

[3] *Moore* v. *Burber*, 11 Jur., N. S. 539.

[4] See the provisions of the Indian Married Woman's Act, III of 1874.

[5] *Supra*, p. 55.

[6] *Venkata Rama Rao* v. *Venkata Suriya Rao*, I. L. R., 2 Mad., 333, P. C.; *Behari Lal Sandyal* v. *Juggo Mohan Gossain*, 6 C. L. R., 422; *Teencowrie Chatterjee* v. *Denonath Banerjee* 3 W. R., 49; *Dhoolub Bhaee* v. *Jeevee*, 1 Borr., 75; *Umraot* v. *Kalyandas*, *Ibid.*, 314.

[7] *Supra*, p. 55.

[8] Act of 1865, s. 46, Expl. 2. This section applies to Hindus etc., under the Hindu Wills Act.

[9] *In the goods of Owston* 2 Sw and Tr. 461; Williams on Executors, 18, *In the goods of Geale*, 3 Sw. and Tr., 151.

of the capacity to make a will[1]; nor does mere incapacity to manage his affairs.[2] Extreme old age, however, tends to excite the jealousy and vigilance of the Court.[3] Under the Indian Succession Act, no person can make a will while he in such a state of mind, whether arising from drunkenness or illness, or from any other cause, that he does not know what he is doing.[4] The real test in all cases of this kind is, whether the testator had a proper appreciation or comprehension of his act.[5] Thus, if no suspicion of fraud exists, a will consistent with previous affection and supported by recognitions and circumstances showing volition and capacity is valid, though made *in extremis*, and though the instructions were conveyed though the party benefited.[6] To constitute a sound disposing mind, a testator, as we have seen, must not only be able to understand that he is by his will giving his property to an object of his regard, but he must also have the capacity to comprehend the extent of the property and the nature of the claims of others whom by his will he may be excluding from participation in the property.[7] In the case of *Prinsep* v. *Dyce Sombre*,[8] Dr. Lushington said "In cases where no mental insanity has either existed or been supposed to exist, the enquiry into the capacity of a testator in extreme old age, enfeebled by long illness, or where death is fast approaching, is simply whether the mental faculties retain sufficient strengh fully to comprehend the act to be done."

As to incapacity arising from drunkenness, it has been held that the mere fact that the testator was addicted to drinking, and had an attack of *delirium tremens* a few days before executing the will, are immaterial, if he was able to understand it at the time of executing it.[9]

A will or any part[10] of a will, the making of which has been caused by fraud[11] or coercion,[12] or by such importunity as takes away the free agency of

[1] *Ex-parte Grahmer*, 18 Ves., 445.

[2] *Sherwood* v. *Sanderson*, 19 Ves., 285.

[3] *Kinleside* v. *Harrison*, 2 Phill., 462, *per* Sir John Nicholl.

[4] Act X of 1865, s. 46, Expl. 4.

[5] *Harwood* v. *Baker*, 3 Moo., P. C., 282; Act X of 1365, s. 46, illusts, (*a*) (*b*) and (*c*); *Prinsep* v. *Dyce Sombre*, 10 Moo., P. C., 278.

[6] *Ross* v. *Chester*, 1 Hagg., 227.

[7] *Harwood* v. *Baker*, 3 Moo, P. C., 282; *Earl of Sefton* v. *Hopwood*, 1 F. and F. 578; *Smith* v. *Tebitt*. L. R., 1 P. and D., 398, 400. See *Smee* v. *Smee*, L. R., 5 P. D. 84.

[8] 10 Moo., P. C., 278.

[9] *Handley* v. *Stacey*, 1 F. and F., 574.

[10] *Allen* v. *McPherson*, 1 H. of L, p. 191.

[11] See *per* Lord Hardwicke in *Lord Donegal's* case, 2 Ves., Sen. 408; *Allen* v. *McPherson*, H. of L., pp. 207 and 208.

[12] *Hall* v. *Hall*, L. R., 1 P. and D., 481.

the testator, is void.[1] If part of a will had been obtained by fraud only such part is void, and probate may be granted of the other part.[2]

It is not necessary to constitute coercion that there should be actual violence. Imaginary terrors may be sufficient for that purpose.[3] If a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end, that the impressions, which she knows he had thus formed, may never be removed, such contrivance may be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive."[4] The influence to vitiate an act must amount to force and coercion destroying free agency, and there must be proof that the act was obtained by this coercion.[5] It must be shewn that the will of the testator was coerced into doing that which he did not desire to do, but the mere fact that in making the will he was influenced by immoral considerations does not amount to undue influence, so long as the disposition of the will express the wishes of the testator.[6] It is not because one person has unbounded influence over another that such influence, when exercised, even though it may be very bad indeed, is undue influence in the legal sense of the word. Thus a young man may be caught in the toils of a harlot who makes use of her influence to induce him to make a will in her favour to the exclusion of his relatives. It may unfortunately be natural that a man so entangled should yield to that influence, and confer large bounties upon the person with whom he has been brought into such relation, yet the law does not attempt to guard against such contingencies. So a man may be the companion of another and may encourage him in evil courses, and thus obtain what is ordinarily called an undue influence over him and the consequence may be a will in his favour. But that again, shocking as it is, will not amount to an undue influence in the eye of the law.[7] The importunity or persuasion which does not deprive the testator of the exercise of his judgment and volition will not amount to undue influence.[8]

If a testator was prevented by force and threats from altering or revoking a will, the Court may declare that the person using the force or threats are trustees in respect of anything taken under the will.[9]

[1] Act X of 1865, s. 48. See the illustrations to the section. This section applies to Hindus, etc. under the Hindu Wills Act.

[2] *Allen* v. *McPherson*, 1 H. of L., p. 191.

[3] *Boyse* v. *Rossborough*, 6 H. L., 2.

[4] *Ibid*, *per* Lord Cranworth.

[5] *Williams* v. *Goude*, 1 Hagg., 581; *Wingrove* v. *Wingrove*, L. R., 11 P. D., 81.

[6] *Wingrove* v. *Wingrove*, L. R., 11 P. D., 81.

[7] *Ibid.*

[8] *Morison* v. *Administrator General*, I. L. R., 7 Mad., 515.

[9] *Betts* v. *Doughty*, L. R., 5 P. Div., 26.

The leading case upon undue influence is that of *Huguenin* v. *Baseley*,[1] where a donation was set aside on the ground of spiritual ascendancy and undue influence obtained by the defendant over the mind of the plaintiff. A more recent case on his subject is that of *Lyon* v. *Home*.[2] In that case the plaintiff, who was a widow of advanced years and weak and superstitious, sought to set aside certain deeds by which the defendant had induced her to transfer to him large sums of money. The defendant, by representing himself as a spiritual medium between the living and the dead, had induced her to believe it to be her late husband's wish that he should be treated as her adopted son, and under that belief the deeds had been executed. The deeds were set aside.

A will is not void if made under the influence of acts of attention and kindness.[3] Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, are all legitimate, and may be pressed on the testator, but pressure of whatever kind whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made.[4]

In the case of *Hall* v. *Hall*,[5] Lord Penzance made the following observations:—"Importunity or threats, such as the testator has not the courage to resist—moral commands asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort—these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes is overborne, will constitute undue influence though no force is either used or threatened. In a word, a testator may be led but not driven, and his will must be the offspring of his own volition and not the record of some one else's."

If there has been no fraud, or coercion or other undue influence, and it be proved that the testator was of sound mind, memory and understanding, and that the will was read over to him, or that he had read it to himself, it must be presumed that he knew and approved of the contents, and such knowledge and approval will be held to extend to every part of the will.[6]

Words or clauses introduced into a will by mistake or accident, without the knowledge of the testator, may be struck out.[7] But, unless words have been

[1] 14 Ves., 273; 2 White and Tudor's L. C., 547; see *Norton* v. *Relly*, 2 Eden, 286.

[2] L. R., 6 Eq., 655.

[3] *Earl of Sefton* v. *Hopwood*, 1 F. and E., 578; Act X of 1865, s. 48. ill. (*h*).

[4] *Hall* v. *Hall*, L. R., 1 P. and D., 482.

[5] L. R., 1 P. and D., 462.

[6] *Atter* v. *Atkinson*, L. R., 1 P. and D., 665; *Goodacre* v. *Smith*, *ib.*, 359; *Harter* v. *Harter*, L. R., 3 P. and D., 11, 22; *Guardhouse* v. *Blackburn*, L. R., 1 P. and D. 109.

[7] *Fulton* v. *Andrew*, L. R., 7 H. L., 448; *Morrell* v. *Morrell*, L. R., 7 P. Div., 68. *In the goods of Oswald*, L. R., 3 P. and D., 162.

inserted or omitted without the knowledge of the testator, the Court cannot correct the will either by the omission of words or by the insertion of other words.[1] In the case of *Guardhouse* v. *Blackburn*,[2] where a will had been read over to a capable testatrix and duly attested by her, the Court refused to exclude from probate certain words inserted in it, and which were not in accordance with the instructions given by her solicitor, nor were contained in the draft codicil which had been read over to, and approved by her, although such words were sworn to by the solicitor, who prepared the codicil, to have been inserted without any instructions from her, and by his inadvertence. Lord Penzance made the following remarks: "It is obvious that if the Court should allow itself to pass beyond proof that the contents of any such paper were read or otherwise made known to the testator, and suffer an inquiry by the oath of the attorney or others as to what the testator really wished or intended, the authenticity of a will would no longer repose on the ceremony of execution exacted by Statute, but would be set at large in the wide field of parol conflict, and be confided to the mercies of memory. The security intended by the Statute would thus perish at the hands of the Court. * * * * The codicil was proved to have been read over to the testator before the execution thereof; she duly executed the same, and the Court conceives it to be beyond its functions or powers to substitute the oath of the attorney who prepared it fortified by his notes of the testator's instructions for the written provisions contained in a paper so executed."

In *In the goods of Oswald*,[3] a testatrix having executed a will was advised that a bequest to her daughter should be secured to her separate use, and she gave directions that a testamentary paper to that effect should be prepared. A paper was thus prepared purporting to be her last will and testament and containing a clause revoking all former wills. The testatrix was not aware that the paper contained such a clause, and it was not read over to her. The clause was said to have been inserted *per incuriam*, and was omitted from the probate.[4]

In cases where portion of a will has been introduced through fraud, it is only where that portion is severable from the remainder that it can be excluded from the will.[5] Where the rejection of part on the ground of its having been introduced by fraud, alters the sense of the remainder, it may be questioned whether there is a valid will at all.[6]

[1] *Harter* v. *Harter*, L. R., 3 P. and D., 11, 22; *Mitchell* v. *Gurd*, 3 Sw. and Tr. 75.

[2] L. R., 1 P. and D., 109, p. 117.

[3] L. R., 3 P. and D., 162.

[4] See *In the goods of Duane*, 2 Sw. and Tr., 590.

[5] *Rhodes* v. *Rhodes*, L. R., 7 App. Ca., 192.

[6] *Ibid.*

LECTURE V.

EXECUTION, REVOCATION, ALTERATION AND REVIVAL OF WILLS

Rules as to Execution of wills—Signature—Attestation—Mark—Stamped name—Position of testator's signature—Signing by initials—Attesting witnesses, whether competent to sign by affixing mark or seal—Attesting witnesses must sign in presence of testator—"Presence of the testator"—Presumption where witnesses have no recollection of attesting testator's signature—What is sufficient acknowledgment—Importance of attestation clause—Effect of gifts to attesting witnesses, or their husbands or wives—Gift to trustee as such, where wife attests will—Acceleration of interests after gift by reason of legatee being attesting witness—Witness not disqualified to prove will by interest, or by being executor—Privileged wills—Rules as to privileged wills—Persons included in terms "soldier" and "mariner or seaman"—Nuncupative wills by privileged persons—"Being at sea"—Minority in case of privileged wills—Revocation of wills—Wills when revoked by marriage—Power of appointment—Wills of Hindus not revoked by marriage—Wills how revoked—Revocation by "other will or codicil"—by cancellation or obliteration—Doctrine of dependent relative revocation—Presumption of revocation—General revocatory clause—Prior codicil, whether revoked by codicil revoking will—Revocation by burning, etc., or "otherwise destroying"—Lost Wills, Presumptions as to—Proof of Contents of lost wills—Destruction of will by a third person—Revocation of will made for valuable consideration—Alterations in w lls—Obliterations—Interlineations—Erasures—General presumptions as to alterations—Wills containing blanks—Revocation of privileged wills—Revival of wills—Extent of revival of will or codicil partly revoked and afterwards wholly revoked—Wills cannot be revived by implication—Intention to revive—Evidence of re-execution of revoked will—Re-publication of revoked will.

Having dealt with the general characteristics of wills and discussed the capacity necessary to the valid exercise of testamentary power, I propose now to deal with the requirements for the due execution of a valid will and with the rules which regulate the revocation, alteration and revival of wills.

By s. 50 of the Indian Succession Act[1] every testator, who is not a soldier employed in an expedition or engaged in actual warfare, or a mariner at sea (soldiers and sailors being allowed under certain circumstances to make what are called privileged wills) must execute his will according to the following rules:—

[1] This section applies to Hindus, etc., under the Hindu Wills Act.

First.—The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

Second.—The signature or mark of the testator, or the signature of the person signing for him, shall be so placed, that it shall appear that it was intended thereby to give effect to the writing as a will.

Third.—The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

In the English Wills Act, 1 Vict., c. 26, s. 9, the words as to signing are "shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction." Under that section it was held that a mark by the testator for a signature, although the name did not appear, was sufficient,[1] and that although the testator was himself able to write.[2] So, where a wrong name was added after the mark, but there was no doubt as to identity of the testator, the execution was held to be good.[3] Sealing is not a signature[4] unless, perhaps, where the seal is affixed by way of signature,[5] and sealing without signing has been held not to be sufficient.[6] A will may be signed by a former name, as in the case of a woman signing the name of a former husband,[7] or it may be signed under an assumed name,[8] the signature in each case being treated as a mark. In the same way a signing by initials has been held to be sufficient.[9]

A will may be written on several sheets of paper and in such a case one signature is sufficient.[10] If the will is on several pieces of paper, it is not necessary that they should all be connected together. It is sufficient that they should be in the same room when the execution took place, and the legal presumption is that sheets bound together and constituting the will as found in the testator's desk

[1] *In the goods of Brice*, 2 Curt., 325; *In the goods of Amiss*, 2 Rob., 116.

[2] *In the goods of Field*, 3 Curt., 752.

[3] *In the goods of Clarke*, 1 Sw. and Tr., 22; *In the goods of Douce*, 2 Sw. and Tr., 593.

[4] *Wright* v. *Wakeford*, 17 Ves., 459.

[5] See *Jenkins* v. *Gaisford*, 3 Sw. and Tr., p. 96.

[6] *Grayson* v. *Atkinson*, 2 Ves. Sen., 459; *per* LORD HARDWICKE.

[7] *In the goods of Reading*, 3 Rob., 339.

[8] *In the goods of Glover*, 11 Jur., 1022.

[9] *In the goods of Savory*, 15 Jur. 1042.

[10] *Winsor* v. *Pratt*, 2 Brod. and B., 650: *Marsh* v. *Marsh*, 1 Sw. and Tr., 528.

or other receptacle were so bound together at the time of the execution and attestation.[1]

With reference to the provision in the Indian Succession Act that the will should be signed by 'some other person in the presence of the testator and by his direction' it has been held, in Bombay, that the person making the signature on the will for the testator is not competent as an attesting witness of its execution.[2] "Some other person," in the third of the rules to section 50 of the Indian Succession Act, the Court there interpreted as meaning "some person other than the attesting witnesses." In England, it has been held, that there is nothing in the English Statute, which prevents an attesting witness from also signing the will for the testator by his direction.[3] The person so signing may do so in his own name.[4] It was held that the *direction* of the testator amounts to an acknowledgment, and it is that direction which the witness attests.[4]

In all cases in which the will is signed by another person, there must be some act or word on the part of the testator to show that the signature was made at his request.[5]

In *Jenkins* v. *Gaisford*,[6] where a testator towards the end of his life had his usual signature engraved so that it might be stamped on letters and other documents requiring his signature, and made two codicils each of which was so stamped with his name by another person in his presence and by his direction, it was held that the codicils were duly executed. Sir C. Cresswell said: "It has been decided that a testator sufficiently signs by making his mark, and I think that it was rightly contended that the word "signed" must have the same meaning whether the signature is made by the testator himself or by some other person in his presence or by his direction, and therefore a mark made by some other person under such circumstances must suffice. Now whether the mark is made by a pen or by some other instrument cannot make any difference, neither can it in reason make a difference that a *facsimile* of the whole name was impressed instead of a mere mark. The mark made by the instrument or stamp was intended to stand for and represent the signature of the testator. In the case[7] where it was held that sealing was not signing, the seals were not affixed by way of a signature."

In India the use of stamped names is by no means uncommon. It may

[1] *Marsh* v *Marsh*, 1 Sw and Tr., 528; 30 L. J., (P. M. and A.), 77; *Rees* v. *Rees*, L. R, 3 P. and D., 84.

[2] *In the goods of Vanabhai Sarabji Avabhai* v. *Pestanji Nanabhai*, 11 Bom H. C R, 87.

[3] *In the goods of Bailey*, 1 Curt, 914.

[4] *In the goods of Clark*, 2 Curt., 329.

[5] *Smith* v *Harris*, 1 Rob, 362

[6] 3 Sw. and Tr., 93

[7] *Re Marshall*, 13 L. T, N S, 643, cited in Shelford's Real Property Statutes, 506

be questioned whether, under the Indian Succession Act, a person signing for the testator may sign by a mark, for the second rule under s. 50 of that Act seems to draw a distinction between the "signature *or mark* of the testator" and the "signature of the persons signing" for the testator.

Where the testator does not himself sign the will but some other person signs it in his presence and by his direction, then besides that other person there must be two witnesses who must sign the will in the presence of the testator.[1]

Under the second rule laid down by s. 50 of the Indian Succession Act the signature or mark of the testator, or the signature of the person signing for him must have been intended to give effect to the writing as a will. The provisions of this rule are somewhat different from those in the Wills Act Amendment Act, 15 and 16 Vict., c. 24, s. 1, which enacts, that the "signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing as his will." The object of the Statute was to prevent a space being left between the foot or end of the will and the signature of the testator so as to admit of additions being made after execution.[2] Under the English Act it was held, that a will of an English lady, which was drawn up by a Notary in France, and signed by her, not at the end of the will itself, but at the end of a notarial minute, which immediately followed the will, detailing the circumstances under which the will was executed, was signed in compliance with the Statute.[3]

Mr. Bonnerjee, in his Commentary on the Hindu Wills Act, p. 6, points out that most documents in this country are signed by the parties executing them on the top, and suggests that, as the rule does not lay down any positive rule as to where wills are to be signed, that the practice may still be safely followed.

It is sufficient under the English Statute, it seems, for the signature to be physically connected with the will, provided that otherwise its position is in compliance with the Statute. Thus, where the deceased signed his name on a piece of paper upon which no dispositive part of his will was written and this paper was attached by string to the paper on which the will was written, just opposite to the termination of the writing, it was held that the execution was valid, there being evidence that the papers were in the same state at the time when the signing took place.[4] So, where the signatures of the testator and attesting witnesses were written on a separate piece of paper previously

[1] *In re Hemlota Dabee*, I L. R., 9 Cal., 226, see *In the goods of Vanabhai Sorabji Avabhai v. Pestanji Nanabhai*, 11 Bom. H. C. R., 87

[2] *Corneby* v. *Gibbons*, 1 Rob., 705, p. 708.

[3] *Page* v. *Donovan*, 2 Jur., N. S., 220; *In re Gausden*, 2 Sw. and Tr., 263.

[4] *In the goods of Horsford*, L. R., 3 P. and D., 211.

wafered to the foot of the will, the will was held to be duly executed.[1] In cases where the signatures are not on the same piece of paper as that on which the will is written, but upon a piece of paper attached thereto, evidence must be given to show that, at the time of the signature, the papers were attached.[2] Where a codicil, written on half a sheet of paper, occupied so much space as not to leave room for the signatures of the testator and of the witnesses in the ordinary form, and beneath it were the signatures of the two attesting witnesses, and on the right hand side of the paper, in a blank space between the edge and the codicil, the signature of the testator was written at right angles to the codicil,—it was held, that the codicil was duly signed.[3] Where, however, the testator signed the first five sheets of a will, but omitted to sign the sixth, which was the last, and the attesting witnesses signed all the six sheets, no part of the will was admitted to probate.[4] It was contended in favour of the will that probate might be granted of the first five sheets and the signature at the bottom of the fifth sheet treated as the execution of the will. The answer to the contention, apart from the necessity, under the English Statute of Wills, for the will to be signed at the foot or end thereof, was that the signature at the bottom of the fifth and preceding sheets was intended to guard against other sheets being interpolated,[5] and that when the testator stopped at the fifth sheet, it was only because he thought it was the last and not that he intended his signature there as an execution of the whole. Although, as we have seen, a signing by initials is sufficient,[6] a signature, it appears to have been considered in *In the goods of Wilson*,[7] must be completed. In that case, the testator was unable to complete his signature and probate was refused.[8]

Where a testator read over an attestation-clause containing his name written by himself in the presence of two witnesses, who subscribed the names, and the testator then, on the opposite page of the paper, wrote some words, beneath which he added, "Attestation, John Walker, testator," and the names of two executors, it was held, that the testator intended to give effect to his will by the signature of his name in the attestation clause.[9] So, where the testator, after

[1] *Cool* v. *Lambert*, 32 L. J., P., 89 : 3 Sw. and Tr., 46.

[2] *In the goods of West*, 12 W. R., (Eng.), 89; Shelford's Real Property Statutes, p. 587 *In the goods of Horsford*, L. R , 3 P. and D , 211.

[3] *In re Jones*, 4 Sw. and Tr., 1.

[4] *Sweetland* v. *Sweetland*, 4 Sw. and Tr., 6.

[5] See *Evan* v. *Franklin*, Deane 7.

[6] *In the goods of Savory*, 15 Jur., 1042; *In the goods of Hinds*, 16 Jur , 1161

[7] 2 Curt., 853.

[8] See *In the goods of Savory*, 15 Jur., 1042; *In the goods of Hinds*, 16 Jur., 1161.

[9] *In the goods of Walker*, 2 Sw. and Tr., 354.

filling up a printed form of will, wrote his name in the attestation-clause and after the witnesses had signed their names, the testator again wrote his name beneath their signatures, probate of the will was granted with the omission of the testator's second signature.[1] So a clause added after the testator had signed his name was excluded from probate,[2] the writing being squeezed into the space above and below the signature, and there being no subsequent acknowledgment. But where the last sentence in a testamentary document commenced immediately above the signature of the deceased, and was continued in three short lines to the left of it, the last two lines being somewhat below the signature, the sentence, being shown to have been written before the signature, was included in the probate.[3]

Under the Wills Act Amendment Act, 15 and 16 Vict., c. 24, no signature is operative to give to any disposition or direction which is underneath or follows it, but it seems, that where, from the obvious sequence and sense of the context, it appears to the satisfaction of the Court that the signature of the testator really follows the dispositive part of a testamentary instrument, though it may occupy a place on the paper literally above the dispositive parts or part thereof, the Court will admit such testamentary instrument to probate.[4] Wills have been held duly executed notwithstanding that blank spaces were left after the concluding words. Thus, in *Hunt* v. *Hunt*,[5] where a will ended in the middle of the third page of a sheet of foolscap paper, the lower half of the page being left blank, and the attestation-clause and the signatures being written on the top of the fourth page, the will was held to be duly executed.[6]

As to the sufficiency of attestation by the marks of the witnesses some doubt has arisen in the Indian Courts upon the third rule to s. 50 of the Indian Succession Act. That rule, while it provides that each of the witnesses must have seen the testator *sign or affix his mark* to the will, provides that they must each *sign* the will in the presence of the testators. Had it been the intention of the Legislature that the witnesses, instead of signing, might also affix their marks, we should naturally have expected to find this intention carried out by express words. In *Fernandez* v. *Alves*,[7] M. Melvill and F. D.

[1] *In the goods of Casmore*, L. R., 1 P. and D., 659; *Smith* v. *Smith*, L R., 1 P. and D., 143.

[2] *In the goods of Arthur*, L. R, 2 P. and D, 273.

[3] *In the goods of Ainsworth*, L. R, 2 P. and D., 151; see *In the goods of Kimpton*, 33 L J., Prob, 153; *In the goods of Woodley*, *ib.*, 154; *In the goods of Birt*, L. R, 2 P. and D., 214.

[4] *In the goods of Kimpton*, 3 Sw. and Tr., 427; (S. C.) 33 L. J., Prob, 153.

[5] L. R., 1 P. and D, 209

[6] *In the goods of Wotton*, L. R., 3 P. and D, 159; *In the goods of Archer*, L. R., 2 P. and D., 252; see *In the goods of Gore*, 3 Curt., 758.

[7] 1. L. R., 3 Bomb., 382.

Melvill, JJ., held that it was necessary to the validity of a will that the actual signature, as distinguished from a mere mark, of at least two witnesses, should appear on the face of the will. In *In the goods of Wynne*,[1] which was quoted in argument in that case, Pontifex, J. had said—"I am inclined to think that a signature by mark would be a sufficient signature by a witness even under the Indian Act, as it would undoubtedly be under the English Act." And White, J., in a subsequent case, again suggested a doubt whether it was necessary that the attesting witnesses should affix their signatures as distinguished from their marks.[2] In a very recent case before the High Court at Calcutta, the question again arose, and the Court, following the Bombay High Court, held that it is necessary for the validity of a will that the signature, as distinguished from the mere mark, of at least two witnesses must appear on the will.[3]

In England it has been held that a will is sufficiently attested by a mark,[4] although the witnesses were capable of writing,[5] and although by mistake the wrong name had been written opposite the mark,[6] or by initials.[7]

It need hardly be pointed out that it is not advisable to have wills attested by persons who are unable to subscribe their names.

The placing of initials upon a will to amount to a subscription must be done with the intention of attesting the execution.[8] *In the goods of Martin*,[9] where a will was altered after execution, and on re-execution the witnesses attested the will by placing their initials in the margin opposite to the alteration, it was held that the will was not property re-executed. This decision, however, as pointed out by Mr. Jarman,[10] is questionable, for the initials were intended to represent the signatures of the witnesses, and it was proved by affidavit that they were written with the intention of attesting the re-execution.

One witness, it was held, could not subscribe the name of another, for he might have made his mark.[11] Where the deceased having signed his will in the presence of a servant, and the latter merely subscribed himself as "servant of S" without writing his name, it was held that there was a sufficient attestation,

[1] 13 B. L. R., 392.

[2] *Bissonath Dinda* v. *Doyaram Jana*, 5 C. L. R., 565; (S. C.) I. L. R., 5 Calc., 738.

[3] *Nitye Gopal Sircar* v. *Nagendranath Mitter*, I. L. R., 11 Cal., 429.

[4] *Harrison* v. *Harrison*, 8 Ves, 185; *Addy* v. *Grix*, *Ibid*, 504.

[5] *In the goods of Amiss*, 2 Rob., 116.

[6] *In the goods of Ashmore*, 3 Curt., 756.

[7] *In the goods of Christian*, 2 Rob, 110. *In the goods of Martin*, 1 Rob., 712.

[8] *In the goods of Cunningham*, 29 L J., Ch., 71.

[9] 1 Rob., 712.

[10] Wills, p. 85.

[11] *In the goods of Cope*, 2 Rob., 335; *In the goods of Middleton*, 33 L. J., P. 16; see also *In the goods of Blewitt*, L. R, 5 P. and D., 116; and *In the goods of Shearn*, 50 L. J., P. and M., 15. *In the goods of Leverington*, L. R., 11 P. D., 80.

the witness being taken to have intended the words describing himself to be an identification of himself as the person signing.[1]

It is not sufficient for an attesting witness to trace over a previous signature with a dry pen on the re-execution of a will.[2] Such an act amounts to no more than an acknowledgement of a signature, which is not sufficient,[3] for no authority is given either by the English or the Indian Statute, as in the case of execution, for a witness to acknowledge a signature previously made. The witness must do an act which shall be apparent on the will.[4] Where a witness merely added, on a re-execution of a will, the word "Bristol" to her name written on the previous execution it was held that he had not properly attested the re-execution, the ground of the decision being that there was nothing to show that the word "Bristol" was intended to represent the witness's signature.[5] The subscription, in the words of Lord Chelmsford, must be such a signature as is descriptive of the witness whether by a mark or by initials, or by writing the full name.[6] Where a will was signed by the deceased in the presence of two witnesses, one of whom subscribed it with his own name and the other with the name of her husband, it was held that the will was not properly attested.[7]

A witness unable to write may have his hand guided by another person, who may be one of the witnesses.[8] Thus, in *In the goods of Lewis*,[9] the names of two attesting witnesses were written by another person whilst they held the top of the pen, and the will was held to be duly attested.

It is imperative that the witnesses should sign in the presence of the testator, but it is not necessary that they should sign in the presence of each other.[10] It is sufficient if the signature of the testator is made or acknowledged in the presence of two witnesses. In the case of *Casement* v. *Fulton*,[11] before the Judicial Committee of the Privy Council, it was laid down that the witnesses to a will should subscribe their respective names in the presence of each other. The ground of the decision was this:—If one witness were

[1] *In the goods of Sperling*, 3 Sw. and Tr., 272.

[2] *Playne* v. *Scriven*, 1 Rob., 772. *In the goods of Maddock*, L. R., 3 P. and D. 169.

[3] *Moore* v *King*, 3 Curt., 243.

[4] *Playne* v. *Scriven*, 1 Rob., 772, p. 775, *per* SIR H. JENNER FUST.

[5] *In the goods of Trevanion*, 2 Rob., 311; *Charlton* v. *Hindmarsh*, 8 H. L., Ca., 160. See *In the goods of Christian*, 2 Rob., 110.

[6] *Charlton* v. *Hindmarsh*, 8 H. L., Ca., p. 171.

[7] *In the goods of Leverington*, L. R., 11 P. D., 80.

[8] *Harrison* v. *Elvin*, 3 Q. B., 117; *In the goods of Frith*, 4 Jur., N. S., 288; 27 L. J., Prob., 6; *Pryor* v. *Pryor*, 29 L. J., P., 114.

[9] 31 L. J., Prob., 153.

[10] *In the goods of Webb*, 1 Jur., (N. S.) 1096, citing *Faulds* v. *Jackson*, 6 Notes of Cas., 1.

[11] 5 Moo., P. C., 130; p. 139.

present one day and another on a different day, it would be impossible to say that both attested the same fact, *viz.*, the capacity of the testator, as he might be sane one day and insane the other day, and thus his capacity would only be attested by a single witness. The necessity, however, for the signature to be made or acknowledged before each seems to get over the difficulty suggested by the Judicial Committee, and since the case of *In the goods of Webb*[1] the law on this subject in England may be taken to be settled that it is not necessary that the witnesses must sign the will in the presence of each other. The words 'in the presence of the testator' in the Indian Succession Act, it has been held, cannot receive a larger interpretation than has been put upon them in the English Courts, *viz.*, that the testator must at least be in such a position that he might have seen the witnesses subscribe their names if he had desired to do so.[2] In *Tribe* v. *Tribe*,[3] at the time when the witnesses attested the will, the testatrix lay in bed with the curtains closed and her back to the attesting witnesses, who deposed to her inability to have turned herself so as to have drawn aside the curtains. The will was held not to have been signed in the presence of the testatrix.[4] In the case of *In the goods of Piercy*,[5] where the testatrix was blind, it was held that, even in that case it must appear that the will was so attested that the testatrix, if she had her eyesight, could have seen the witnesses subscribe. If the testator could not by any possibility have seen the witnesses sign, the will is not properly attested.[6]

The testator must be conscious of the fact when the witnesses sign.[7]

There is a presumption, in the absence of evidence to the contrary, even where the witnesses do not recollect the facts attendant on the execution, that the will was duly executed and attested,[8] especially where there is a regular attestation clause.[9] In *Wright* v. *Sanderson*,[10] neither of the witnesses to a codicil could say anything as to what writing was on the paper, nor as to whether the testator's

[1] 1 Jur., N. S., 1096.

[2] *Esaias* v. *Gabriel*, 3 All., H. C. R., 32.

[3] 1 Rob., 775.

[4] See *Newton* v. *Clarke*, 2 Curt., 320.

[5] 1 Rob., 278.

[6] *In the goods of Colman*, 3 Curt., 118; Intestate and Testamentary Succession, p. 46.

[7] *Right* v. *Price*, 1 Doug. 241; *Jenner* v. *Finch*, L. R., 5 P. Div., 106.

[8] *Burgoyne* v. *Showler*, 1 Rob., 5; *In the goods of Puddephatt*, L. R., 2 P. and D., 97; *Foot* v. *Stanton*, 2 Jur., N. S., 380; *Leech* v. *Bates*, 6 Notes of Ca., 704; *Cooper* v. *Bocket* 3 Curt. 649: 4 Moore's, P. C. 419: *Blake* v. *Knight*, 3 Curt., 547; *Lloyd* v. *Roberts*, 12 Moor., P. C, 158; *Wright* v. *Sanderson*, L. R., 9 P. D., 149; *Blake* v. *Blake*, L. R., 7 P. D., 102.

[9] *Woodhouse* v. *Balfour*, L. R., 13 P. D., 2.

[10] L. R., 9 P. D., 149.

signature was there when they signed, and both said they had not seen him sign. The conduct of the testator both in the preparation and in the calling together of his witnesses showed a desire to do everything regularly. It was held that the presumption, *omnia rite esse acta*, therefore applied, and that this presumption was not rebutted by the evidence of the two witnesses who appeared to have been nervous and confused on the occasion of the attestation and whose recollection of what took place was evidently imperfect. The fact that the testator had experience in the execution of wills or knew what was necessary to be done, it has been said, is strong evidence that the requirements of the Statute have been complied with.[1]

In England, it has been considered a sufficient acknowledgement, if the witness was asked to sign by a third party in the presence, and with the implied assent, of the testator.[2] In *Inglesant* v. *Inglesant*,[3] the deceased signed her will in the presence of one witness. On the entry of the second witness a person present directed him to sign his name under the signature of the testatrix. He did so and the second witness also subscribed his name. The deceased was in the room but said no word during the proceeding. The will was lying on the table open and was headed in large characters with words: "This is the last will and testament of" etc. It had also a full and formal attestation-clause. After taking time to consider, Sir James Hannen held that there was a sufficient acknowledgement of her signature by the testatrix. It is at least doubtful whether this would have been a sufficient acknowledgement under the third rule to s. 50 of the Indian Succession Act which requires the acknowledgement to be a "personal acknowledgement." In another English case,[4] it was said that it is not necessary that the testator should say in express terms "that is my signature," but that if it clearly appears that the signature was existent on the will when it was produced to the witnesses at the request of the testator that they should subscribe it, that will be a sufficient acknowledgement. So a statement made by the testator to the witnesses that a document produced before them is his will is a sufficient acknowledgement if the signature was clearly and visibly apparent on the face of it.[5] This rule was followed by the Bombay High Court in the case of *Manickbhai* v. *Hormasji Bomanji*.[6] The Court, how

[1] *Lloyd* v. *Roberts*, 12 Moo., P. C., 158; *Woodhouse* v. *Balfour*, L. R., 13 Prob. Div., 2.

[2] *Inglesant* v. *Inglesant*, L. R., 3 P. and D., 172.

[3] L. R., 3 P. and D, 172.

[4] *Keigwin* v. *Keigwin*, 3 Curt., 611.

[5] *In the goods of Ashmore*, 3 Curt., 756; *In the goods of Davis*, *ibid*, 348; *In the goods of Dunmore*, 2 Rob., 641; *Cooper* v *Bockett*, 4 Moore's P. C., 419; *Gwillim* v. *Gwillim*, 3 Sw. and Tr., 200; *Smith* v. *Davis*, L. R., 1 P. and D., 143; *Beckett* v. *Howe*, L. R., 2 P. D., 1; see *Blake* v *Blake*, L. R, 7 P. D., 102.

[6] I L. R., 1 Bom., 547.

ever, must be satisfied in a case of this kind that the signature was upon the will when the witnesses signed it. If the signature of the testator be covered up, so that the witnesses do not see it, there will be no acknowledgement.[1] The witnesses must, at the time of the acknowledgement, see, or have the opportunity of seeing, the signature of testator, and if such be not the case it appears to be immaterial whether the signature be in fact there at the time of the attestation, or whether the testator says that the paper to be attested is his will, or that his signature is inside the paper.[2] If the witnesses are merely required to attest an instrument of the nature of which they are not informed, there is no acknowledgement,[3] though it is not necessary where the witnesses have seen the signature that they should know the document was a will.[4] Where, however, there was no formal attestation-clause, and no affirmative evidence that, at the time of the attestation, the deceased's name was on the paper, the mere production of it to witnesses, with a request that they will sign it as a paper, was held not sufficient to justify the Court in drawing the inference that it was already signed by the testator.[5]

It is for the Court to judge from the circumstances and from the appearance of the document itself whether the name of the testator was, or was not, upon it at the time of the attestation.[6]

Where a testator admitted execution of a will before a Registrar, and the witnesses attesting that admission signed their names in the presence of the testator, their attestation was held to be a sufficient compliance with the requirements of this section, and to remedy any defects in the original attestation of the will.[7]

An acknowledgment before attestation may be made by gestures, but an acknowledgment after attestation is not sufficient.[8] As we have seen, the attest-

[1] *Hudson* v. *Parker*, 1 Rob., 14; *Shaw* v. *Neville*, 1 Jur., N. S.. 403.

[2] *Blake* v. *Blake*, L. R., 7 P. D., 102; following *Hudson* v. *Parker*, 1 Rob., 14, and disapproving of *Gwillim* v. *Gwillim*, 3 Sw. and Tr., 200; *Beckett* v. *Howe*, L. R., 2 P. D., 1.

[3] *In the goods of Rawlins*, 2 Curt, 863.

[4] See *Keigwin* v. *Keigwin*, 3 Curt., 607; *Gaze* v. *Gaze*, 3 Curt., 451; See also *Ilott* v. *George*, 3 Curt., 176.

[5] *In the goods of Davis*, 2 Rob., 337; *Fischer* v. *Popham*, L. R., 3 P. and D., 246.

[6] *In the goods of Huckvale*, L. R., 1 P. and D., 375; *Gwillim* v. *Gwillim*, 3 Sw. and Tr., 200; (S. C.) 29 L. J., P. and M., 31; *Smith* v. *Smith*, L. R., 1 P. and D., 143; *Gaze* v. *Gaze*, 3 Curt, 451; *Wright* v. *Sanderson*, L. R., 9 P. D., 144; *Blake* v. *Blake*, L. R., 7 P. D, 102; *Blake* v. *Knight*, 3 Curt., p. 561.

[7] *Hurro Soondari Dabia* v. *Chunderkant Bhattacharjea*, 6 C. L. R., 303; (S. C.) I. L. R., 6 Calc., 17; see also *In the goods of Roymoney Dossee*, I. L. R., 1 Calc., 150; and *In re Hemlota Dabee*, I. L. R., 9 Cal., 226.

[8] *In the goods of Olding*, 2 Curt., 865; *Cooper* v. *Bockett*, 3 Curt., 648; (S. C.) 4 Moore's P. C., 419; *Hindmarsh* v. *Charlton*, 8 H. of L., 160.

ing witnesses must actually have seen the testator sign or affix his mark to the will. In a case in England it was held that, where the witnesses had seen the testator write what the Court presumed to be his signature, although they had not actually seen the signature, the attestation was good.[1] In that case the testator concealed the signature with a piece of blotting paper.

According to s. 9 of the English Wills Act, upon which the third rule also is based, "the signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

A signature by the testator after the attestation by the witnesses, it has been held, both in England and in India, is clearly not a compliance with the Act.[2] In the case of *Hurro Sundari Debia*,[3] it was said that the requirements of the section would have been satisfied, if the testatrix had admitted her signature before a Registrar of Assurances and had been identified before him by one of the witnesses to the signature, and if both the Registrar and the identifier had signed their names to the admission.[4]

Following the case of *In the goods of Regan*,[5] the third rule to section 50 of the Indian Succession Act allows the testator to acknowledge the signature made by another person for him. But the Bombay and Calcutta High Courts have held that that other person must be some person other than the attesting witnesses, and they have accordingly decided that an attesting witness is not competent, under the first of the rules to that section, to sign a will for the testator by his direction.[6]

Where a will is signed *for* the testator, it is advisable that the fact should be mentioned in the attestation-clause.[7]

If witnesses merely put their seals to a will that will not be sufficient attestation, for each of the witnesses must actually sign.[8]

[1] *Smith* v. *Smith*, L. R., 1 P. and D., 143.

[2] *In the goods of Olding*, 2 Curt., 865; *In the goods of Byrd*, 3 Curt., 117. *In the matter of Hurro Sundari Dabia*, I. L. R., 6 Calc., 17; (S. C.) 6 C. L. R., 303; *Bissonath Dinda* v. *Doyaram Jana*, I. L. R., 5 Calc., 738; (S. C.) 5 C. L. R., 565; *Fernandez* v. *Alves*, I. L. R., 3 Bomb., 382; *Mussamut Khuttun Kooer* v. *Mussamut Poona Kooer*, 24 W. R., 322.

[3] I. L. R., 6 Cal., 17; (S. C.) 6 C. L. R., 303.

[4] *Nitye Gopal Sircar* v. *Nagendro Nath Mitter*, I. L. R., 11 Cal., 429; see *In the goods of Roymoney Dossee*, I. L. R., 1 Calc., 150.

[5] 1 Curt., 908.

[6] *In the goods of Vanabhai Sorabji Avabhai* v. *Pestonji Nanabhai*, 11 Bom., H. C. R., 87. *In re Hemlota Dabee*, I. L. R., 9 Cal., 226.

[7] *In the goods of Cooper*, 5 No. Cas., 618, cited in Agnew's Statute of Frauds, p. 309.

[8] Indian Succession Act, s. 50, third rule. *In the goods of Byrd*, 3 Curt., 117.

The signatures of the witnesses need not be in any particular part of the will, so long as the Court is satisfied that their names were subscribed on it for the purpose of attesting the testator's signature.[1] The attestation, if not on the same sheet of paper as the signature of the testator must be on a paper in some way physically connected with that sheet.[2] Where a will was written in duplicate, one copy of which was signed only by the deceased and the other only by the attesting witnesses, it was held that the attestation was insufficient.[3]

Although neither in England nor under the Indian Succession Act is any particular form of attestation-clause necessary,[4] it is advisable to add one, for the absence of it makes a difference in the extrinsic evidence, which would be required to prove that the witnesses had seen the testator execute the will, and that they signed with the intention of attesting it at his request and in his presence, as clear and satisfactory evidence must be given on these points.[5]

The following is the usual form of attestation:—

"Signed by the above A. B. (testator) in the presence of us, present at the same time, who have hereunto signed our names as witnesses thereto in the presence of the said A. B. (testator) and in the presence of each other.

Names of witnesses { *C. D.* / *E. F.*

By the English Wills Act it is enacted[6] that if any person shall attest the execution of any will to whom, or to whose wife, or husband any beneficial devise, legacy, estate, interest, gift or appointment of, or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, gift or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will.

[1] *In the goods of Wilson*, L. R., 1 P. and D., 269; *Eckersley* v. *Platt*, *ib.*, 281. *In Griffiths* v. *Griffiths*, L. R., 2 P. and D., 300, where one of the witnesses signed opposite the word 'executor' and the other opposite the word 'witness.' *In the goods of Pearse*, L. R., 1 P. and D. 269. *In the goods of Braddock*, L. R., 1 P. Div., 433.

[2] *In the goods of Braddock*, L. R., P. Div., 433.

[3] *In the goods of Hatton*, L. R., 6 P. Div., 204.

[4] See *Bryan* v. *White*, 2 Rob., 315; *In the goods of Roymoney Dossee*, I. L. R., 1 Cal., 150.

[5] *Roberts* v. *Phillips*, 4 E. and B., 457, *per* LORD CAMPBELL.

[6] Vict., 26, s. 15.

That most useful provision has been followed, in slightly altered terms, in s. 54 of the Indian Succession Act which declares that "a will shall not be considered as insufficiently attested by reason of any benefit thereby given, either by way of bequest or by way of appointment, to any person attesting it, or to his or her wife or husband: but the bequest or appointment shall be void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them. *Explanation.*—A legatee under a will does not lose his legacy by attesting a codicil which confirms the will."

Section 54 of the Indian Succession Act, it is to be observed, has not been applied by the Hindu Wills Act to Hindus, and therefore a legatee under a will of a Hindu or other person to whom the Hindu Wills Act applies will not lose his legacy by attesting the will.

The use of the word 'thereby,' which occurs, not only in the Indian Succession Act, but in the Wills Act, sufficiently indicates that it is only a benefit given by the particular instrument attested, which is avoided.[1] And, it has been held that each witness attests only the instrument to which he puts his name.[2] Accordingly, a bequest of a legacy is not void because the legatee attests a codicil which gives him nothing.[3] It would seem, also, that a residuary legatee of a share of a residue does not lose the benefit by attesting a codicil which by revoking legacies given by the will, indirectly benefits him by increasing the residue.[4] But where a codicil, which cancelled a condition attached to a legacy which was given by the will and which could only have been taken under the codicil, was attested by the legatee, the legacy was held to be void.[5]

A gift to one witness is not rendered valid because without him there was the full number of witnesses required by law.[6] If the question be raised as to whether a legatee is an attesting witness, the Court has merely to consider the intention with which his signature has been put upon the will and if the Court is satisfied that a witness signed with intent to attest, that will be sufficient to make him an attesting witness, although he signed also in the character of executor.[7] In *Wigan* v. *Rowlandd*[8] WOOD, V. C., held, where the execution of a will was attested by two marksmen, and signed also by two other persons as witnesses, that the signature of the two latter must be deemed

[1] *Gurney* v. *Gurney*, 3 Drew., 209, *per* Kindersley, V. C.

[2] *Tempest* v. *Tempest*, 2 K. and J., 642, affirmed 7 D. M. G., 470.

[3] *Gurney* v. *Gurney*, 3 Drew., 208, Act X of 1865, s. 52. Explanation.

[4] *Ibid.*

[5] *Gaskin* v. *Rogers*, L. R., 2 Eq., 284.

[6] *Doe* v. *Mills*, 1 Moo. and R., 288; *Administrator-General* v. *Lazar*, I. L. R., 4 Mad., 244

[7] *Griffiths* v. *Griffiths*, L. R., 2 P. and D., 300.

[8] 11 Hare, 157.

to have been affixed in attestation of the will and not merely as verifying the attestation of the marksmen, and that a legacy to the wife of one of them failed. In *Randfield* v *Randfield*,[1] however, where a will properly signed and attested was written on the first three pages of a sheet of paper, and there were written on the top of the fourth page these words—"This last will and testament was written in our presence and in the presence of each by him," which were signed by the witnesses who had already attested, and by *G B.*, who was a devisee under the will, it was held, that this was not such an attestation of the will as to deprive *G. B.* of her legacy. So, in another case, the Court allowed evidence to be given to show that the signature of a person, who signed after two persons in whose presence the will was executed, was not made in order to attest the testator's signature.[2]

Where a bequest is made to a trustee, but not for his personal benefit, it is not invalidated by the fact that the will was attested by his wife.[3]

If a codicil refers to the will that amounts to a republication and incorporation of the will. Accordingly, a gift to an attesting witness to the will is rendered valid by a duly attested codicil which refers to the will.[4]

Where there was a gift to a class as joint tenants and one of them attested the will, it was held that the gift to the witness was forfeited, but was not undisposed of, but survived to the other joint tenants.[5]

Under the English Wills Act, s. 15, the marriage, after the attestation of a will, of the devisee to the attesting witness, was held not to affect the devise,[6] and there seems to be no reason why the law should not be held to be the same in this country.

Where a will contained a direction for payment of debts and also that C, one of the executors, (a solicitor) should be entitled to charge and receive payment for all professional business done under the will, and C was one of the attesting witnesses, it was held in an administration suit by B, that the executors could not be deprived of the costs out of the assets of a cross-examination for the purpose of investing B's claim, and that C as an attesting witness was prohibited from receiving that which was not a debt of which payment could be enforced, but a beneficial gift which could only be claimed by virtue of the direction in the will.[7]

[1] 8 H. of L., 225.

[2] *In the goods of Sharman*, L. R., 1 P. and D., 661; Intestate and Testamentary Succession, p 56.

[3] *Cresswell* v. *Cresswell*, L R., 6 Eq, 69.

[4] *Anderson* v. *Anderson*, L. R., 13 Eq, 381.

[5] *Young* v. *Davies*, 2 Dr. and Sm, 107.

[6] *Thorpe* v. *Bestwick*, L. C. R, 6 Q. B. D, 311.

[7] *In re Barber, Burgess* v. *Vinnicome*, L. R., 31 Ch. D., 665.

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In the case of *Clark* v. *Randall*,[1] a testator devised and bequeathed all his real and personal estate to his wife for life, and after her death to be divided equally between such of her children as should be living at her death, and in case of any of the above-mentioned children dying before his wife having children, such children were to take their parent's share: and in the event of any of his daughters being married at his wife's decease, it was his will that such proportion as they might be entitled to, should be left to them and their children exclusively and should in no way be controlled by their husbands. At the death of the testator's widow, one of the daughters, who had several children, was living, and, her husband having been an attesting witness, the gift to her was void, but it was held that her children were not to be disappointed by her disability but took an immediate interest in her share as tenants in common.[2]

As under the English Wills Act, no person to whom the Hindu Wills Act or the Indian Succession Act is applicable is, by reason of interest in, or of his being an executor of a will, disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.[3]

I have already dealt with the incorporation of documents by reference in the will.[4]

I shall now proceed to discuss what are called privileged wills.

Soldiers and mariners are allowed both in England and in India in cases to which the Indian Succession Act[5] applies, under certain circumstances, to make privileged wills. Under section 52 of the Indian Succession Act any soldier being employed in an expedition or engaged in actual warfare, or any mariner being at sea may, if he has completed the age of 18 years, dispose of his property by a will made according to certain rules prescribed by s. 53 of the same Act. These rules are as follows:

First.—The will may be written wholly by the testator with his own hand. In such case it need not be signed, nor attested.

Second.—It may be written wholly or in part by another person, and signed by the testator. In such case it need not be attested.

Third.—If the instrument purporting to be a will is written wholly or in part by another person, and is not signed by the testator, it shall be considered to be his will if it be shown that it was written by the testator's directions, or that he recognized it as his will. If it appear on the face of the instrument,

[1] L. R., 31 Ch. D., 72.

[2] See *In re Townsend's Estate*, L. R., 34 Ch. D., 357.

[3] Act X of 1865, s. 55, which applies to Hindus, etc., under the Hindu Wills Act; 1 Vict., c. 26, ss. 16 and 17.

[4] *Supra*. pp 66—70.

[5] The provisions of the Indian Succession Act, as to privileged wills have not been made applicable to Hindus, etc. under the Hindu Wills Act.

that the execution of it in the manner intended by him was not completed the instrument shall not, by reason of that circumstance, be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument.

Fourth.—If the soldier or mariner shall have given written instructions for the preparation of his will, but shall have died before it could be prepared and executed, such instructions shall be considered to constitute his will.

Fifth.—If the soldier or mariner shall, in the presence of two witnesses, have given verbal instructions for the preparation of his will, and they shall have been reduced into writing in his lifetime, but he shall have died before the instrument could be prepared and executed, such instructions shall be considered to constitute his will, although they may not have been reduced into writing in his presence, nor read over to him.

Sixth.—Such soldier or mariner as aforesaid may make a will by word of mouth by declaring his intentions before two witnesses present at the same time.

Seventh.—A will made by word of mouth shall be null at the expiration of one month after the testator shall have ceased to be entitled to make a privileged will.

Section 52 of the Indian Succession Act is based on s. 11 of the English Wills Act which enacted that "any soldier being in actual military service or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of the Act,"—that is, without the formalities required by the Act. The Statute of Frauds, 29 Car. II, c. 3, s. 23, had provided that notwithstanding that Act, any soldier being on actual military service, or any mariner or seaman being at sea might dispose of his moveables, wages, and personal estate as he or they might have done before the making of the Act. Certain special provisions have been made applicable to the wills of mariners and seamen in the Royal Navy by the Navy and Marine (Wills) Act, 1865 (28 and 29 Vict., c. 72). In England, except in the cases referred to in the last-mentioned Statute, any soldier on actual service, and any mariner or seaman being at sea may dispose of his personal property by will, in the manner allowed before the Statute of Frauds.[1] In India, the only privilege conferred by Statute is that accorded by ss. 52 and 53 of the Indian Succession Act.

A surgeon of a regiment who is actually employed in an expedition,[2] a soldier serving in the field against insurgents,[3] a mariner serving on a military expedition but not being at sea,[4] have been held to be entitled to make privileged

[1] As to wills of merchant seamen in certain cases, see 17 and 18 Vict., c. 104, s. 200.

[2] Indian Succession Act, s. 52, illustration (*a*).

[3] *Ibid*, illustration (*c*).

[4] *Ibid*, illustration (*f*).

wills. The purser of a merchant-ship is a mariner, and being at sea can also make a privileged will.[1] A mariner of a ship in the course of a voyage, though temporarily on shore while she is lying in harbour, is a mariner within the meaning of the section.[2] But, an admiral who commands a naval force, but who lives on shore and only occasionally goes on board his ship is not considered as at sea, and cannot make a privileged will.[3]

The term soldier was held to include persons in the military service of the East India Company.[4] The privilege, it will be observed, applies to such soldiers only as are actually engaged upon an expedition or upon actual warfare. Accordingly, an informal will of a soldier, made while living in barracks either in England,[5] or in the Colonies, cannot be admitted to probate[6] So an informal will made at Bangalore by a soldier in command of the Mysore Division of the army stationed there, and who died whilst on a tour of inspection of the troops, was held not to be privileged.[7] Probate was refused in the case of a will of a soldier ordered to join an expedition on active service, but who died before he commenced to march.[8] But where an officer was on his way from one regiment to another, both regiments being at the time on actual service, his will was held to be privileged.[9] In *In the goods of Tweedale*,[10] where the will of the testator was signed while he was employed as a soldier on actual military service, it was held, that material alterations, about the making of which no information could be obtained, were to be presumed to have been made during the continuance of such service, and the alterations were included in the probate,[11]

The terms "mariner and seaman" include the whole naval profession[12] The purser of a man-of-war,[13] a surgeon in the Navy,[14] and, as we have seen, a seaman in the merchant navy,[15] have all been held to come within the terms.

[1] Indian Succession Act, s. 52, illustration (*b*). *In the goods of Hayes*, 2 Curt., 338; *In the goods of Donaldson*, 2 Curt, 386.

[2] *Ibid*, illustration (*d*). *In the goods of Parker*, 2 Sw and Tr, 375.

[3] *Ibid*, illustration (*e*). *Euston (E. of)* v. *Lord Hugh Seymour*, cited in 2 Curt., 338

[4] *In the goods of Donaldson*, 2 Curt., 386.

[5] *Drummond* v. *Parish*, 3 Curt, 522.

[6] *White* v *Repton*, 3 Curt., 818.

[7] *In the goods of Hill*, 1 Rob, 276.

[8] *Bowles* v. *Jackson*, 1 Ecc. and Ad, 294, cited in Agnew's Statute of Frauds, 416.

[9] *Herbert* v. *Herbert*, 2 Jur., N. S. 24.

[10] L. R, 3 P. and D., 204.

[11] Intestate and Testamentary Succession, p 52.

[12] *Euston, Earl of* v. *Lord Hugh Seymour*, cited in 2 Curt., 338.

[13] *In the goods of Hayes*, 2 Curt., 338.

[14] *In the goods of Saunders*, L. R., 1 P. and D, 16.

[15] *In the goods of Milligan*, 2 Rob., 108, *In the goods of Parker*, 2 Sw. and Tr., 375.

Three witnesses were required under the Statute of Frauds in the case of a nuncupative will, or will by word of mouth. It was also necessary, under that Statute, that the testator should have called upon the witnesses to bear witness that the words spoken were his will and that there should have been what was called the *rogatio testium*. But a nuncupative testament might be made not only by the proper motion of the testator but also at the interrogation of another.[1]

The factum of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one;[2] and the testamentary capacity of the deceased, and the *animus testandi* at the time of the alleged nuncupation, must appear, in the case of a nuncupative will, by the clearest and most indisputable testimony.[3]

In England, it was held that the will of a soldier, made under s. 11 of the Wills Act, remains operative unless expressly revoked, although the maker of the will remains in England several years after the date of the will.[4] The Indian Succession Act,[5] however, expressly provides that a nuncupative will shall be void at the expiration of one month after the testator shall have ceased to be entitled to make a privileged will By the Roman law, from which the testamentary privilege has been derived, the time was one year: "*Quod in castris fecerint testamentum non communi jure sed quo modo voluerint post missionem intra annum tantum valebit.*"

As to the meaning of the expression "being at sea," it has been held that a will made on shore by the commander-in-chief of the Naval Force at Jamaica, who had an official residence on shore, was not privileged.[6] So probate of an informal will made by a sailor on the day he shipped while his vessel was still in a British port, was refused probate.[7] In *In the goods of Lay*,[8] the will of a seaman, who went on shore, his ship being on an expedition, and there died by an accident, and who made the will immediately after the accident, was allowed to pass as that of a seaman 'at sea.' That case was distinguished from that of the *Earl of Euston*, v. *Lord Hugh Seymour*, on the ground that the testator in the latter case was living on shore and only occasionally went on board. A codicil signed, but not attested, on board a Queen's ship in a *river*, by the commander-in-chief actually engaged in a naval operation, was

[1] *Swinb.* Pt. I, s. 12, pl 6; Williams on Executors, 123.

[2] *Lemann* v. *Bonsall*, 1 Add., 389; Williams on Executors, 123.

[3] *Ibid.*

[4] *In the goods of Leese*, 17 Jur., 216.

[5] S 53, rule seventh.

[6] *Euston, Earl of*, v. *Lord Hugh Seymour*, cited in 2 Curt., 338; 3 Curt., 530.

[7] *In the goods of Corby*, 18 Jur., 634

[8] 2 Curt., 375.

admitted to probate.[1] In that case the codicil incorporated a codicil signed by the testator on shore, but not attested. A will made by a seaman on board a man-of-war permanently stationed in Portsmouth Harbour, was held to be privileged.[2] An informal will of an invalided surgeon, written on board ship while on his way home, was admitted to probate.[3] A letter written by a seaman in the merchant service in the Margate Roads, unattested and containing dispositive words,[4] and a letter by a master of a ship on his arrival at a port, in the course of a voyage,[5] have been admitted to probate.[6] A testamentary paper left by a mariner who died on shore, headed "Instructions to be followed, if I die at sea or abroad," was refused probate on the ground that it was a conditional will.[7]

A minor, *i e.*, a person under the age of 18 years, is not, as we have seen, competent under the Indian Succession Act to make a will, but under the English law privileged persons may make wills if they have attained the age of 14.[8]

We have seen that a will may be revoked by the maker of it at any time when he is competent to dispose of his property by will, even though he may have declared it to be irrecoverable in the strongest and most express terms. Under the Indian Succession Act,[9] which closely follows s. 18 of the Wills Act, 1 Vict. c. 26, a will is revoked by the marriage of the testator. Section 56 of the Indian Act provides that every will shall be revoked by the marriage of the maker, except a will made in exercise of a power of appointment, when the property over which the power of appointment is exercised, would not, in default of such appointment, pass to his or her executor, or administrator, or to the person entitled in case of intestacy, and gives the following explanatory definition of a power of appointment: Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property.[10]

[1] *In the goods of Austen*, 2 Rob., 611.

[2] *In the goods of McMurdo*, L. R , 1 P. and D., 540.

[3] *In the goods of Saunders*, L. R., 1 P. and D., 16.

[4] *In the goods of Milligan*, 2 Rob., 108.

[5] *In the goods of Parker*, 2 Sw. and Tr., 375.

[6] Intestate and Testamentary Succession, p 53.

[7] *Lindsay* v. *Lindsay*, L. R , 2 P. and D , 459. As to conditional wills, see *supra*, p. 63.

[8] *In the goods of Farquhar*, 4 No of Cases, cited in Agnew's Statute of Frauds, 427.

[9] S 56. This section does not apply to Hindus, etc., under Act XXI of 1870.

[10] The provision of the English Act, 1 Vict. c. 26, s. 18, on this subject is as follows: Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir customary heir,

It may be observed here in passing that this section of the Indian Succession Act has not been applied to Hindus and others to whom the Hindu Wills Act is applicable. In fact, s. 3 of the last mentioned Act expressly provides that marriage shall not revoke a will or codicil to which that Act applies.

Formerly, in England, the marriage of a testator did not revoke his will; but under certain circumstances, there was an implied revocation by marriage and the birth of issue. The Wills Act, however, enacted that every will should be absolutely revoked by the marriage alone of the testator. But to revoke a will the marriage must be a marriage recognised by the law. For where the marriage is void, there is no revocation. Thus, where a testator, subject to the law of England, married his deceased wife's sister, it was held the will was not revoked.[1]

A will made by a *feme sole* before marriage will not, it has been held, revive upon the death of the husband without a republication.[2]

The Indian Succession Act is applicable to Jews, and in a case before Mr. Justice Phear[3] a will made by a Jew, subsequently to his first marriage but previously to a second marriage in the lifetime of his first wife, the second marriage, although in the lifetime of the first wife, being admittedly lawful, was held to have been revoked under the Indian Succession Act by the second marriage. It appears to have been assumed in that case that the Indian Succession Act was applicable to the particular will, which was dated the 23rd November 1856, whereas under s. 331 of the Act, its provisions do not apply to any will made before the 1st of January 1866.[4]

A will made by an unmarried man in contemplation of marriage being revoked by the marriage, evidence not amounting to proof of republication cannot be received to show that the testator meant his will to stand good, notwithstanding the marriage.[5]

The reason for the exception in section 56 of the Indian Succession Act, appears to be, that the revocation by marriage of a will made in exercise of a power of appointment would not operate to the benefit of the family of the testator, but to the benefit of those who would be entitled in default of appointment.[6] Even where, in the event of certain contingencies happening, the

executor or administrator or the person entitled as his or her next of kin under the Statute of Distributions.)

[1] *Mette* v. *Mette*, 1 Sw. and Tr., 416.

[2] *Long* v. *Aldred*, 3 Add., 48; Williams on Executors, 63.

[3] *Gabriel* v. *Mordakai*, I. L. R., 1 Cal., 148. See *supra* p. 11.

[4] See the note at page 148, I. L. R., 1 Cal., 148.

[5] *Marston* v. *Doe* d. *Fox*, 8 Ad. and E., 14; *In the goods of Cudywold*, 1 Sw. and Tr., 34.

[6] See *In the goods of Fitzroy*, 1 Sw. and Tr., 133.

property appointed would not, in default of appointment, pass to the persons who would have taken in the case of intestacy, it was held that a will made in exercise of a power of appointment was not revoked by a subsequent marriage.[1] In that case, the persons who would have taken would have done so, not as upon an intestacy under the Statute of Distributions, but under a settlement. Where, however, under a settlement, freehold estates in default of appointment would have passed to the heir of the testatrix, it was held that the will was revoked.[2] Where by the will of A a power was given to B, under certain circumstances, to dispose by will of property, and, in default of her appointment, the property was to devolve on the person or persons who at her decease should be her next of kin, and B, in pursuance of that power, executed a will in favour of a person whom she afterwards married but who died in her lifetime, it was held that the personal estate appointed by the will of B would not in default of appointment have passed to the person entitled as her next of kin under the Statute of Distributions, and consequently that her will was not revoked by her subsequent marriage.[3]

By section 19 of the English Wills Act, it is enacted that no will shall be revoked by any presumption of an intention on the ground of an alteration in the circumstances, and s. 20 of the same Act enacts that "no will or codicil or any part thereof shall be revoked otherwise than aforesaid or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the same manner in which a will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same." Section 57,[6] of the Indian Succession Act follows s. 20, and seems wide enough to include the provisions enacted by s. 19 of the English Act. It provides that "no unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."[5]

[1] *In the goods of Fenwick*, L. R., 1 P. and D., 319.

[2] *Vaughan* v. *Vanderstegen*, 2 Drew., 165, see p. 168. Intestate and Testamentary Succession, p. 57.

[3] *In the goods of McVicar*, L. R., 1 P. and D., 671.

[4] This section applies to Hindus, etc., subject to s. 3 of the Hindu Wills Act, which provides that marriage will not revoke a will or codicil.

[5] The following illustrations are given to the section:

(*a*). A has made an unprivileged will; afterwards A makes another unprivileged will which purports to revoke the first. This is a revocation.

Under the Statute of Frauds, a will of realty could only be revoked by a subsequent will or codicil signed by the testatrix in the presence of three or four witnesses (s. 6); while wills of personalty could not be revoked by mere parol, but might have been revoked by a writing read to and allowed by the testator and proved to be so by three witnesses at least (s. 22).[1] Under this Act, as under the English Wills Act, a revoking will or codicil must be executed in the same manner as any other will or codicil. It will be observed that a distinction has been drawn between a 'will or codicil' and 'some writing.' Thus, where at the foot of his will the deceased wrote a memorandum to the effect that 'this will was cancelled this day,' and he duly executed the memorandum in the presence of two witnesses, it was held, that the memorandum was not a will or codicil but only a "writing" which could not be admitted to probate.[2] Where a testator had obliterated the whole of a codicil including his signature by thick black marks, and, at the foot of it, had written the words, signed by herself and attested by witnesses: "we are witnesses of the erasure of the above" it was held that the codicil was revoked, the words mentioned amounting, if not in the letter, at least in the spirit of the Statute to a "writing declaring an intention to revoke." In another case, in the attestation clause of a third codicil it was stated by mistake that the first codicil was cancelled. It was held that the attestation clause formed no part of the will, and that, therefore, the first codicil was not revoked.[3] But where the testator, in a letter addressed to his brother, which was signed by him in the presence of two witnesses, directed his brother to obtain his will and burn it without reading it, it was held, that the letter was a writing duly executed, declaring an intention to revoke the will; and administration with the letter only annexed was granted to the next-of-kin of the deceased.[4]

The rule appears to be that a 'writing' by which a testator merely revokes a prior disposition will not be admitted to probate[5] unless it is of a testamentary character.[6] All questions of revocation are questions to some decree of intention, for every act of revocation is said to be equivocal[7] and, if the act done,

(*b*). A has made an unprivileged will. Afterwards A, being entitled to make a privileged will, makes a privileged will, which purports to revoke his unprivileged will. This is a revocation.

[1] See *Ex parte Earl of Ilchester*, 7 Ves., 348.

[2] *In the goods of Fraser*, L. R., 2 P. and D., 40; see also *In the goods of Hicks*, L. R., 1 P. and D., 682. Intestate and Testamentary Succession, p. 58.

[3] *In the goods of Atkinson*, L. R., 8 P. Div., 165.

[4] *In the goods of Durance*, L. R., 2 P. and D., 406.

[5] *In the goods of Fraser*, L. R., 2 P. and D., 40.

[6] *In the goods of Durance*, L. R., 2 P. and D., 406.

[7] *Smith* v. *Cunningham*, 1 Add., 455; *per* SIR J. NICHOLL.

though in itself sufficient to revoke a testamentary instrument, can be shown to have been done for a purpose other than to revoke the instrument, it will not operate as a revocation. No act by which a testator may destroy or mutilate a testamentary instrument operates as a revocation, unless it is done *animo revocandi*.[1] But any act of cancellation or destruction is *primâ facie* done *animo cancellandi*.[2] In all cases evidence as to the intention to revoke must be clear.[3] There is a presumption that a will, which was in the testator's custody until his death and could not then be found, was destroyed by the testator with the intention of revoking it, and this presumption must, it was held, prevail unless it is rebutted by clear and satisfactory evidence.[4]

A revocation made which the testator is of unsound mind is ineffectual.[5] In *Brunt* v. *Brunt*,[6], a testator, during an attack of *delirium tremens*, tore up his will. The pieces were preserved, and, on his recovering, he was informed of what he had done, and answered that he must have been mad when he did the act, and that he would make a fresh will, and it was held that the will had not been revoked. Where a will was destroyed by the testator on the assumption that he had substituted another for it, which was not duly executed, it was held on the evidence that he meant only to destroy the first will on substituting another for it and the first will was admitted to probate.[7] Where a testator destroyed his will under an erroneous supposition that it had been revoked, it was held that the destruction did not operate as a revocation and a draft of the will so destroyed was admitted to probate.[8] So if a testator destroys his will under a false impression that it is invalid[9] there is no revocation. Where an executor altered the will by the direction of the testator, who approved of it in its altered state and then cancelled it only in order that another might be drawn up, and the preparation of another will was prevented by the death of the testator, the will was held not to have been revoked and probate was granted of it in its original state,[10] the cancellation being considered conditional.

In general, the revocation of a will under an erroneous assumption of facts

[1] *Powell* v. *Powell*, L. R., 1 P. and D. 212.

[2] *Rickards* v. *Mumford*, 2 Phill., p. 24; *per* SIR J. NICHOLL.

[3] *Ellis* v. *Bartrum*, 25 Beav., 187; *Cleobury* v. *Beckett*, 14 Beav., 583; *Eckersley* v. *Platt*, L. R., 1 P. and D., 281.

[4] *Eckersley* v. *Platt*, L. R., 1 P. and D., 281.

[5] *Scruby* v. *Fordham*, 1 Add., 74.

[6] L. R., 3 P. and D., 37.

[7] *Scott* v. *Scott*, 1 Sw. and Tr., 258.

[8] *Clarkson* v. *Clarkson*, 2 Sw. and Tr., 497: *In the goods of Thornton*, 3 Curt., 913.

[9] *Giles* v. *Warren*, L. R., 2 P. and D., 401.

[10] *In the goods of Applebee*, 1 Hagg., 143; see *Powell* v. *Powell*, L. R., 1 P. and D., 209; *In the goods of Weston*, L. R, 1 P. and D., 633; *Ex parte (Earl of) Ilchester*, 7 Ves., 372.

will be inoperative, if the mistake appears on the face of the instrument.[1] In *Campbell* v. *French*, the testator gave legacies to the grandchildren of his sister, and afterwards revoked the legacies on the ground that the legatees were dead. It having been proved that the legatees were not dead, it was held that the legacies were not revoked. But a revocation of a will by codicil will be complete although the codicil will not in law have the effect the testator intended.[2] In a case where a testatrix devised lands to L for life, remainder to his first and other sons and daughters successively in tail, and L died leaving one son and one posthumous daughter, the son having died, the testatrix being ignorant of the existence of the daughter, made a codicil reciting the death of L without leaving issue and devising the land to H in the same manner as she had before done to L. It was held that the codicil must be construed as a conditional revocation only, and was inoperative as against the daughter of L, although the testatrix after making the codicil and two years before her death had become acquainted with her existence.[3] Where a testator erased his signature with an avowed intention of writing it in a better style, and, therefore, wrote it again but not in the presence of the attesting witnesses, it was held, that the instrument was entitled to probate, the original signature being considered as restored. The principle acted upon being that in making the erasure there was no intention to revoke the will.

A will is not revoked by mere abandonment. There must be some unequivocal act of cancellation or obliteration by the testator himself, or by some other person in his presence and by his direction.[4]

Where on the death of the deceased a will was found, the signature to which had been cut out but gummed on to its former place, the will having been in the custody of the deceased up to the time of his death, declarations by the deceased of an intention to benefit his wife by will made subsequent to the date of the will were proved. No other will was forthcoming and it was held that the presumption was that the deceased cut out the signature *animo revocandi* and that the gumming of the signature on its original place did not revive the will.[5] That case was based on the doctrine, applicable in cases where the will has always remained in the custody of the testator, that in the absence of evidence to the contrary any mutilation or cancellation was done by the testator himself and done *animo revocandi*.[6]

In cases where the act of destruction is done with the sole intention of set-

[1] *Campbell* v. *French*, 3 Ves., 321; see *Crosthwaite* v. *Dean*, L. R., 5 Eq., 245.

[2] *Quinn* v. *Buller*, L. R., 6 Eq., 225.

[3] *Doe d. Evans* v. *Evans*, 10 Ad. and E., 228.

[4] *Andrew* v. *Motley*, 12 C. B., N. S., 514.

[5] *Bell* v. *Fothergill*, L. R., 2 P. and D., 148.

[6] *Ibid*; *Davies* v. *Davies*, Lee., 445; *Lambell* v. *Lambell*, 3 Hagg., 568.

ting up and establishing some other testamentary paper, the *animus revocandi* has only a conditional existence, the condition being the validity of the paper intended to be substituted. In such cases where the intention is to set up a later will, as we have seen, there will be no revocation if that will be not valid.[1] And it has now been held that there is no revocation where the intention is to set up a previously executed instrument which cannot be set up. In other words a revocation made with the intention of reviving some other disposition will only take effect if that other disposition is effectually revived.[2] The revocation and the substitution must be so connected that it can be said that the substitution of an effectual disposition was the condition of the revocation of the original will.[3] In *Ex parte Earl of Ilchester*,[4] Lord Alvanley said, that the rule to be gathered from the cases was, that, where it was evident that the testator, though using the means of revocation, could not intend it for any other purpose than to give effect to another disposition, though if it had been a more revocation it would have had effect, yet the object being only to make way for another disposition, if the instrument cannot have that effect, it will not be a revocation. It makes no difference that the latter will is in favour of another person.[5] This doctrine is what is called the doctrine of dependent relative revocation. It applied only, it was at one time thought, where a testamentary instrument was destroyed on the supposition that a subsequently executed will was valid, so that a will cancelled on the supposition that an earlier will was thereby revived would not on failure of that condition be revived.[6]

The doctrine is discussed at length in the case of *Powell* v. *Powell*, where a testator who had made a will on the 3rd March 1862, and a second will revoking the first on the 29th March 1864, destroyed, in 1865, the will of 1864, his object in destroying the will being to set up the will of 1862.[7] There Lord Penzance, who dealt with the case of *Dickenson* v. *Swatman*, said: "This doctrine is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident or, if intentional, of various intentions. It is therefore necessary in each case to study the act

[1] *Powell* v. *Powell*, L. R., 1 P. and D., 209; see *In the goods of Weston*, L. R., 1 P. and D., 633.

[2] *Onions* v. *Tyrer*, 1 P. Wns., 345; *Ex parte Ilchester*, 7 Ves., 348, 372; *Lord Thynne* v. *Stanhope*, 1 Add., 52.

[3] *In the goods of Hutcheson*, L. J., 32 Prob., 202.

[4] 7 Ves., 372.

[5] *Ibid*; *Dancer* v. *Crabb*, L. R., 3 P. and D., 98. See also *In the goods of Fleetwood*, L. R, 15 Chan. Div., 594, 608-9.

[6] *Dickinson* v. *Swatman*, 30 L. J., P. and M., 84.

[7] L. R., 1 P. and D., 209, p. 212.

done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied. For unless it be done *animo revocandi* there is no revocation. What then, if the act of destruction be done with the sole intention of setting up and establishing some other testamentary paper for which the destruction of the paper in question was only designed to make way? It is clear that in such a case the *animus revocandi* has only a conditional existence, the condition being the validity of the paper intended to be substituted, and such has been the course of decision in the various cases quoted in argument. But then it is said that this method of reasoning has only hitherto been applied to cases in which the destruction of the script has accompanied the execution intended in substitution; and that no decided case can be found in which the instrument intended to be established has been a long previously executed paper. But I fail to perceive a distinction in principle between the two cases. For what does it matter whether a testator were to say 'I tear this will of 1860, because I have this day, (1st of January 1861) executed another designed to replace it'? or 'I tear this will of 1860 because I desire and expect that the effect of my so doing will be to set up my will of 1840?' In either case the revocatory act is based on a condition which the testator imagines is fulfilled. In both cases the act is referable, not to any abstract intention to revoke but to an intention to validate another paper, and, as in neither case is the sole condition upon which revocation was intended fulfilled, in neither is the *animus revocandi* present."

Where the names of the attesting witnesses had been cut out by the testator, who gave as his reason that he intended to alter his will or make a new one, and they were afterwards replaced on the same day, the testator saying the will would do for the present, probate was granted, the cancellation being held to have been for the purpose of making a fresh will.[1] But if a testator merely intending to make a new will revoke a will already made, although no new will be executed, the revocation is complete,[2] for, as it was said in *Powell* v. *Powell*,[3] in order that the doctrine of dependent relative revocation may apply, the act of destruction must be referable wholly and solely to the intention of setting up some other testamentary paper. Thus *in the goods of Weston*,[4] where the testator destroyed a will without stating at the time her intention in doing so, and subsequently on the same day said that she had destroyed the will with the intention that a former will should take effect, the Court refused under the circumstances to grant probate of the draft of the will so destroyed. The

[1] *In the goods of Eeles*, 2 Sw. and Tr., 600; 32 L. J., Prob., 4.

[2] *Williams* v. *Tyley*, 1 Johns., 530.

[3] L. R., 1 P. and D., 209.

[4] L. R., 1 P. and D., 633.

main distinction between this case and that of *Powell* v. *Powell* was that in the latter there was distinct and undoubted evidence that at the very moment the deceased destroyed his last will, he stated that he did so, in order that the earlier will should prevail, whereas in the other case the supposed declarations of the testator were not made at the time.

The result is that where the act of cancellation or destruction is connected with the making of another will, so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation or any other cause, the revocation fails also, and the original will remains in force.[1]

In the case of *Dancer* v. *Crabb*, the testator having the will in her hand dictated certain alterations, which she desired to be made in the first part of it, to a friend, who wrote them down. Feeling unwell she desired her friend to stop there, and then tore off and burnt so much of her will as had been covered by the memorandum written at her dictation. This memorandum together with the rest of the will, which contained the residuary clause, and the signatures of the testatrix and witnesses and the attestation clause intact, was placed in a desk by the testatrix and locked up, and she believed when she did so, that these papers constituted a new will, and were not merely instructions for a new will. The case was treated as one of dependent relative revocation, a revocation dependent on the papers locked up constituting a new will, and probate was granted of the original will as contained in the portion which remained, and the draft of the portion which was destroyed. In another case, where the testator having executed a will and codicil signed a second codicil, in which he expressed a desire to cancel his will, and that a document, which he described as a will of earlier date, and the first and second codicils should together stand as his last will and testament, it appeared that the only document executed at the earlier date was a deed of settlement, which was not of a testamentary character. It was held that the revocation was absolute and not dependent on the incorporation of the settlement in the papers admitted to probate.[2]

The principle of dependent relative revocation applies to the case where a testator has so entirely erased a name of a legatee that it is no longer apparent, and has substituted another name for it, and the Court will receive evidence to show what the original name was, and restore it to the will, if satisfied that the testator only revoked the first bequest on the supposition that he had effectually substituted a new legatee.[3] The doctrine, however, of dependent relative

[1] *Dancer* v. *Crabb*, L. R., 3 P. and D., 98.

[2] *In the goods of Gentry*, L. R., 3 P. and D., 80.

[3] *In the goods of McCabe*, L. R., 3 P. and D., 94; *Brooke* v. *Kent*, 3 Moo., P. C., 334; *In the goods of Harris*, 1 Sw. and Tr., 536; *In the goods of Parr*, 29 L. J., (P. M. and A.) 70.

revocation will not arise where the name of a legatee is obliterated and that of another person substituted after the execution of the will, if there is no evidence of intention showing that the obliteration of the first name would not have been made unless the testator believed he could validly substitute the name of the other person.[1] The principle is held to apply in cases where the amount of a bequest has been obliterated after the execution of the will and a different amount has been interlineated or written over. The substituted bequest being a nullity, as not having been made in conformity with the Statute, the original bequest takes effect,[2] if it can be shown by evidence, what the original bequest was.[3] The principle also applies in cases where the name of the executor is erased and that of another person inserted as executor, without due re-execution of the will,[4] but not where there is a mere erasure of a legacy without the substitution of another.[5]

It requires some nicety to distinguish between those cases where perfect erasure is fatal, and those where the erasure may be treated as an erasure for the purposes of substitution. In *In the goods of Horsford*,[6] where the testator pasted over a whole legacy a piece of paper, on which, at some time, about which the witnesses could give no information, he had written a new bequest, the Court refused to order the upper paper to be removed, and directed the probate to issue in blank as to that legacy, but in respect of another legacy, the amount of which only was covered up, the name of the legatee being left untouched, the Court treated it as a case coming under the principle of dependent relative revocation.

In all cases of revocation the intention of the testator may be proved by evidence. The onus is upon those who oppose the will to prove that the cancellation was the act of the testator.[7] But where a will has remained with the testator and cannot be found, it is presumed that it was destroyed by the testator, *animo revocandi*,[8] unless the testator were insane at the time of his death,[9] for in that case it must be shown that the will was revoked, when the testator was in a sound state of mind. The presumption of revocation may, in all cases, be rebutted by evidence of the declarations of the deceased.[10]

[1] See *Quinn* v. *Butler*, L. R., 6 Eq., 225; *Tupper* v. *Tupper*, 1 K. and J., 665; *Newill* v. *Boddam*, 28 Beav., 554; *Onions* v. *Tyer*, 1 P. Wms., 343.

[2] *Brooke* v. *Kent*, 3 Moo., P. C., 334. See *Locke* v. *James*, 11 M. and W., 901; *Soar* v. *Dolman*, 3 Curt., 121.

[3] *In the goods of Horsford*, L. R., 3 P. and D., 211; *In the goods of Ibbetson*, 2 Curt. 337.

[4] *In the goods of Parr*, 29 L. J. P., 70; *In the goods of Harris*, 1 Sw. and Tr., 536.

[5] *In the goods of Horsford*, L. R., 3 P. and D., 211.

[6] L. R., 3 P. and D., 211.

[7] *Hitchings* v. *Wood*, 2 Moore's P. C., 355; see *Benson* v. *Benson*, L. R., 2 P. and D., 172.

[8] *Eckersley* v. *Platt*, L. R., 1 P. and D., 281.

[9] *Sprigge* v. *Sprigge*, L. R., 1 P. and D., 603.

[10] *Whitely* v. *King*, 17 C. B., N. S., 756; *Wharnam* v. *Wharnam*, 3 Sw. and Tr., 303.

The mere fact of making a subsequent testamentary paper even though it may purport to be the *last will* does not work a total revocation of a prior one, unless the latter expressly, or in effect, revokes the former, or the two be incapable of standing together.[1] So that, if a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the latter instrument is only revoked as to those parts where it is inconsistent, and both papers are entitled to probate.[2] But when there is no express clause of revocation in a subsequent will the question is what was the disposition intended by the testator.[3] If the subsequent will purports to be the only will of the testator, it may be a revocation of a prior will.[4]

In the case of *Hellier* v. *Hellier*,[5] a testator made a will in 1864, appointing his wife sole executrix, and in 1877 he duly executed another will. The second will could not be found, and there was no evidence of its contents, except that after its execution, the testator said, "I have made a will altering my affairs, and I have taken care of Ellen (his wife), and there will be something for Roby" (his nephew), and, except a memorandum at the foot of an earlier will, as follows: "This will is now useless, a new will having been made in 1877, upon my wife telling me she was sorry she had ever seen me." The Court held that, in the absence of proof of an alteration of executrix, or of a revocatory clause, or disposition wholly inconsistent with the first will, the will was not revoked. BUTT, J., however, doubted whether the memorandum was admissible in evidence to show an intention to revoke the first will.

It is a maxim that no man can die with two testaments, yet any number of instruments, whatever be their respective dates, or in whatever form they may be, so as they be all clearly testamentary, may be admitted to probate as containing the last will of the deceased.[6]

If property given to one person is given by a subsequent codicil to another, the gift to the former is of course revoked.[7] But where there are two inconsistent wills of the same date, and neither can be proved to be the later executed, they are both void for uncertainty.[8] Where there is no inconsistency, effect will be given in such a case to all the testamentary dispositions of the testator.[9]

[1] *Lemage* v. *Goodban*, L. R., 1. P. and D., 57; see *In the goods of Howard*, 1 P. and D., 636; *Cutto* v. *Gilbert*, 9 Moore, P. C., 131.

[2] *Lemage* v. *Goodban*, L. R., 1 P. and D., 57.

[3] *Ibid.*

[4] *Freeman* v. *Freeman*, 5 DeG., M. and G. 710, *per* KNIGHT BRUCE, V. C.

[5] L. R., 9 P. Div., 237.

[6] *Masterman* v. *Maberley*, 2 Hagg. 235 *Lemage* v. *Goodban*, L. R., 1. and D., 57; *In the goods of Budd*, 3 Sw. and Tr., 196; *In the goods of Griffith*, L. R., 2 P. and D., 457; *In the goods of Patchell*, L. R., 3 P. and D., 153.

[7] *Kermode* v. *MacDonald*, 3 Ch., Apt., 585; *Hitchens* v. *Basset*, 3 Mod., 206.

[8] *Phipps* v. *Lord Anglesey*, 2 Atk., 57.

[9] *Plenty* v. *West*, 6 C. B., 201; 1 Rob., Ecc., 264. See *Cutto* v. *Gilbert*, 9 Moo. P. C., 131.

If it can be collected from the words of the testator in a later instrument that it was his intention to dispose of his property in a manner different to that in which he disposed of it by an earlier document, the earlier document will be revoked, and this, although in some particulars the later will does not completely cover the whole subject matter of the earlier.[1] Where the deceased executed a will in 1858, by which she disposed of the whole of her property, and in 1860 she executed another will, which commenced "This is the last will and testament of me" etc., and which varied and repeated various bequests given in the first will, appointed the same executors for England as in that document, but contained no residuary or revocatory clause, the Court held from the general tenor of the last will, that it was clear the testator did not intend the first will to remain in force and it was therefore revoked.[2]

Parol evidence may be given of the contents of a will which cannot be found, and if it be proved that such a will contained a clause revoking a former will before the Court, the will produced will be held to have been revoked.[3]

It is a recognised principle that a codicil is not to be taken as revoking a former will or codicil further than is absolutely necessary to give effect to the purposes appearing on the codicil and so far as those purposes fail, the original gift prevails.[4] Thus, a specific bequest will be revoked by a subsequent bequest in a codicil of all personality, but a general legacy charged on land will be unaffected.[5]

A general clause in a will revoking all former wills revokes a prior testamentary appointment. This was held by Jessel, M. R.,[6] and his decision was upheld by the Court of Appeal. In the case before him, a married woman having a general power of appointment by will over real estate executed a will appointing the estate. After the death of her husband, she made another will, revoking all former wills and containing a general devise and bequest of all her real and personal estate. She afterwards made a third will also revoking all former wills and bequeathing her personal estate, but not devising or appointing her real estate. She had no real estate except that subject to her power of appointment. The Court held that the testamentary appointment under the first will was revoked by the second will, and the second will by the third, and that the real estate therefore went in default of appointment. But; in several cases where a will was made in exercise of

[1] *Plenty* v. *West*, 6 C. B., 201; 1 Rob., Ecc., 265; see *Dempsey* v. *Lawson*, L. R., 2 P. Div. 98, p. 101, *per* HANNEN, J.

[2] *Dempsey* v. *Lawson*, L. R., 2 P. Div., 98.

[3] *Wood* v. *Wood*, 1 P. and D., 309.

[4] *Doe* v. *Hicks*, 2 M. and C. 606; *Norman* v. *Kynaston*, 30, F. and J. 29.

[5] *Kermode* v. *MacDonald*, L. R., 3 Ch. 585; *Sheddon* v. *Goodrich*, 8 Ves., p. 501.

[6] *Sotheron* v. *Dening*, 20 Ch., D. 99.

power of appointment, a subsequent will, made in exercise of another power of appointment and containing a clause revoking all former wills, was held not to operate as a revocation of the first will.[1] In one of these cases,[2] a married woman exercised two powers of appointment in separate wills executed at different times. The later will contained a general clause of revocation, and it was held that the general revocatory clause did not operate as a revocation of the prior will made under a power, because it did not refer either to the power or to the property, the subject of the power. In *In the goods of Merrett*,[3] and *In the goods of Joys*,[4] it was held that, where a specific appointment was made by will under a power in a settlement to A and then there was an appointment by another will under a power in another settlement to B, and the second will contained a general revocatory clause, the second will did not revoke the first and that the first was entitled to probate, the second will being confined to the exercise of the power of appointment under the second settlement. The mere revocation of "all former wills," it was said, had no reference to the property, the subject of the power under the first settlement. According to these authorities, therefore, a general revocatory clause does not operate as a revocation of a prior will made under a power, unless there is a special reference to it or some other evidence of an intention to revoke it.

A codicil revoking a will does not necessarily revoke a prior codicil.[5] It is a mere question of construction. Where a testator, who has distinguished between his last will and a codicil to it, purports to revoke his last will only, not referring to any previous codicil, the revocation is not to be carried further than the necessity of the terms which he has used may require.[6] When reference is made to the will as a particular instrument, as where it is referred to by date, or were the revoking codicil distinguishes the last will from intervening codicils, the latter are not revoked.[7]

A mere attempt to tear or burn is not sufficient to revoke a testamentary instrument, though made with intent to revoke.[8] 'Tearing or otherwise destroying" includes cutting.[9] But, cutting out a particular part of the will is a

[1] *In the goods of Meredith*, 29 L. J., P. and M., 155; *In the goods Merritt*, 1 Sw. and Tr., 112; *In the goods of Joys*, 4 Sw. and Tr., 214.

[2] *In the goods of Meredith*, 29 L. J., P. and M , 155.

[3] 1 Sw. and Tr., 112.

[4] 4 Sw. and Tr., 214.

[5] *Farrer* v. *St. Catherine's Coll.*, L. R., 16 Eq, 19.

[6] *Bunny* v. *Bunny*, 3 Beav., 109; *Pratt* v. *Pratt*, 14 Sim., 129.

[7] *Farrer* v. *St. Catherine's Coll.*, L. R., 16 Eq., 19.

[8] *Doe* v. *Harris*, 6 A. and E., 209.

[9] *Hobbs* v. *Knight*, 1 Curt., 768; *Bell* v. *Fothergill*, L. R. 2 P. and D., 148.

revocation of that part only.[1] Where a will after execution had remained in the custody of the testatrix and was found after her death in her repositories with her own signature and those of the attesting witnesses scratched out, as with a knife, Butt, J. held that the scratching out might be regarded as a lateral cutting out.[2]

As the Act, we have seen, says, "no will or *any part thereof* shall be revoked etc.;"[3] except in the manner provided, it was obviously intended that part only of a will may be revoked by a subsequent act, or by a subsequent will or codicil.[4] In the case of *In the goods of Woodward*,[5] the first seven or eight lines had been cut out and the will was admitted to probate in its incomplete state.

Although the cutting off by the testator of the signatures of the testator and witnesses at the end of a will, or of the witnesses[6] is in general a total revocation, if done with intent to revoke, the mere crossing out of the testator's signature or that of the testator and of the witnesses, there being no evidence on the point, is not a revocation.[7] But where a will consisted of several sheets, all of which were signed, it was held that the destruction of the last signature revoked the whole will, the destruction of the signature being considered to have been done *animo revocandi*.[8] If a will is found to have been in the custody of the testator up to the time of his death with the signature cut off, the presumption, in the absence of evidence to the contrary, is that it was done *animo revocandi*,[9] even although the piece cut off may have been preserved and gummed on to its former place.[10] In a case where the testator cut from the will the portion of the document on which the name and address of the second attesting witness were written, and the excised part was found with the will in the testator's desk, the Court being satisfied that the name had not been removed *animo revocandi* decreed probate of the instrument.[11]

The words "otherwise destroying" in s. 57 of the Indian Succession Act must be understood as intending some mode of destruction *ejusdem generis* with

[1] *Christmas* v. *Whinyates*, 3 Sw. and Tr., 81; *In the goods of Woodward*, L. R., 2 P. and D., 206.

[2] *In the goods of Morton*, L. R., 12 P. D., 141.

[3] Indian Succession Act, s. 57. This section applies to Hindus, etc., under Act XXI of 1870.

[4] See *Clarke* v. *Scripps*, 2 Rob., 563, 567.

[5] L. R., 2 P. and D., 206.

[6] *In the goods of Gullan*, 1 Sw. and Tr., 23; *Evans* v. *Dallow*, 31 L. J., P. and M., 128.

[7] *Benson* v. *Benson*, L. R., 2 P. and D., 172; *Stephens* v. *Taprell*, 2 Curt., 465; see *In the goods of Lewis*, 1 Sw. and Tr., 31.

[8] *In the goods of Gullan*, 1 Sw. and Tr., 23.

[9] *In the goods of Lewis*, 1 Sw. and Tr., 31; *Bell* v. *Fothergill*, L. R., 2 P. and D., 148.

[10] *Bell* v. *Fothergill*, L. R., 2 P. and D., 148.

[11] *In the goods of Wheeler*, 49 L. J., Prob., 29.

burning or tearing and not a mere obliteration.[1] Where a testator drawing a pen through the lines of various parts of his will, wrote on the back of it, "This is revoked" and threw it among a heap of waste papers in his sitting room, it was held that the will was not revoked; the words "or otherwise destroying" not being satisfied, as, whatever the testator intended, the will, which had being lying about in the kitchen of his house, had not been actually injured.[2]

Where the testator, after executing a codicil at the foot of his will, cut off his signature to the will, it was held, upon proof that he thereby intended to revoke the codicil as well as the will, that the former was also revoked.[3]

We have already seen that in every case of alleged revocation it is a question of the intention of the testator, and that the whole will is not *necessarily* revoked by the destruction of a part. To constitute a legal revocation otherwise than by marriage or by a duly executed instrument there must be, not only the manual operation of tearing, burning or destroying the will by other means, but also the *animus*. It is the *animus* which must govern the extent and measure of operation to be attributed to the act and determine whether the act shall effect the revocation of the whole instrument or only part of some portion. If, therefore, a portion of a will not necessary to its validity is destroyed the question of the testator's intention at once arises. Thus in *Clarke* v. *Scripps*,[4] where a testator executed a will in 1843, which remained in his custody until his death, when it was found in a mutilated state, torn and cut, but the signatures of the testator and of the attesting witnesses remained at the end of the will, it was held, in the absence of extrinsic evidence from the peculiar manner in which the mutilations were effected, that there was no intention to revoke the whole will, but that the papers as altered were intended as a draft of a new will and in the event of his not making a new will to operate as a will. The testator died suddenly.

If a will cannot be found, and the Court is satisfied that a will was not in existence at the time of the testator's death,[5] the presumption in general arises that it was destroyed with intent to revoke.[6] But this presumption of revocation may, of course, be rebutted by evidence of declarations of the deceased.[7]

Where it appears that a will is merely lost, its contents, like those of any

[1] *Stephens* v. *Taprell*, 2 Curt., 458, *per* SIR H. JENNER.

[2] *Cheese* v. *Lovejoy*, L. R., 2 P. Div., 251; *Elms* v. *Elms*, 1 Sw. & Tr., 155; *Doe* v. *Perkes* 3 B. & A., 489.

[3] *In the goods of Bleckley*, L. R., 8 P. D. 169.

[4] 2 Rob., 563.

[5] *Finch* v. *Finch*, L. R., 1 P. and D., 371.

[6] *Eckersley* v. *Platt*, L. R., 1 P, and D., 281.

[7] *Whitely* v. *King*, 17 C. B. (N. S.), 756; *Wharram* v. *Wharram*, 3 Sw. and Tr., 303.

other lost instrument, may be proved by secondary evidence.[1] The evidence of a single witness, although interested, whose veracity and competency are unimpeached, has been sufficient.[2] Declarations, written or oral, made either before or after, are admissible as secondary evidence of the contents of a lost will.[3] The case of *Sugden* v. *Lord St. Leonards* overruled that of *Quick* v. *Quick*,[4] by which it was decided that the declarations of the testator after execution were not admissible.[5] Where the contents of a lost will are not completely proved, probate will be granted to the extent to which they are proved.[6]

It was held in England under the old law, and also under the Wills Act, that a revocation of a will was in general a revocation of a codicil,[7] unless it was of such a character as to be completely independent of the will.[8] But it is now settled by the later cases that a codicil can only be revoked in the manner indicated by the Wills Act, and is not revoked by the revocation of a will.[9] In the case, however, of *In the goods of Bleckley*,[10] where the testator, who had executed a codicil at the foot of his will, cut off his signature to the will, it was held, upon proof that he meant to revoke both the will and codicil, that the latter was also revoked.

The destruction of a will by a third person must be by the testator's direction and in his presence,[11] and, accordingly, a testator cannot delegate his power of revoking his will by inserting in it a clause conferring on another authority to destroy it after his death.[12] In a case where a codicil was burnt by order of the testator, but not in his presence, it was held that it was not revoked and probate was granted of a draft copy.[13]

It has been held in England that a will made for valuable consideration cannot be revoked in equity.[14] In *Robinson* v. *Ommaney*,[15] it was contended that

[1] *Sugden* v. *Lord St. Leonards*, L. R., 1 P. D., 154; *Brown* v. *Brown*, 8 E. and B., 876.

[2] *Ibid.*

[3] *Ibid.*

[4] 3 Sw. and Tr., 442.

[5] Intestate and testamentary Succession, p. 63.

[6] *Sugden* v. *Lord St. Leonards*, L R., 1 P. Div. 154.

[7] *Grimwood* v. *Cozens*, 2 Sw. and Tr., 364.

[8] *In the goods of Greig*, L. R., 1 P. and D., 72.

[9] *In the goods of Savage*, L R., 2 P. and D., 78; *In the goods of Turner*, *ib.*, 403; *Black* v. *Jobling*, L. R., 1 P. and D., 685; See *Gardiner* v. *Courthope*, L. R., 12 P. D., 14. Intestate and Testamentary Succession, p. 63.

[10] L. R., 8 P. D., 169.

[11] Wills Act, s. 20; Indian Succession Act, s. 57.

[12] *Stockwell* v. *Rutherdon*, 1 Rob., 661; *per* SIR H. JENNER FUST.

[13] *In the goods of Dadds*, Dea. and Sw., 290, cited in Williams on Executors, p. 43.

[14] *Loffus* v. *Maw*, 3 Giff., 592; but see *Caton* v *Caton*, L. R., 2 H. L., 127.

[15] L. R., 21 Ch. D., 780.

a covenant not to revoke a will was against public policy as being in restraint of marriage, one of the modes of revocation being marriage. It was considered however, that such a covenant was not necessarily against public policy, for the covenant expanded into its full meaning was a covenant not to burn the will and not to perform the other acts of revocation recognized by the statute, including a covenant not to marry, and the particular covenant being read distributively was held to be good, so far, at least, as it was not a covenant not to marry.[1]

As to obliterations, interlineations, alterations or erasures in wills, the English Wills Act, by s. 21, enacts that "no obliteration, interlineation, or other alteration made in a will after the execution thereof shall be valid, or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as is hereinbefore required for the execution of the will; but the will with such alteration as part thereof shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will, opposite, or near to such alteration, or at the foot, or end of, or opposite to a memorandum referring to such alteration and written at the end, or some other part of the will."[2] Section 58 of the Indian Succession Act is modelled upon s. 21 of the English Wills Act. It provides that: "no obliteration, interlineation, or other alteration made in any unprivileged will after the execution thereof, shall have any effect, except so far as the words or meaning of the will shall have been thereby rendered illegible or undiscernible, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; save that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or in some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will." Under the Indian Succession Act, therefore, as under the English Wills Act, obliterations or other alterations must be attested in the same manner as a will or codicil. Where, therefore, an alteration is made, but not duly attested, the *original* will, so far as it can be deciphered, is unaffected;[3] but parol evidence is not admissible to show what the original was, where it cannot be deciphered by means of magnifying glasses or otherwise.[4] In the case *Townley* v. *Watson*,[5] the testatrix obliterated, *animo*

[1] See Sheppard's Touchstone, Preston's Edition, Vol. II, p. 401.

[2] 1 Vict., c. 26, s. 21.

[3] *In the goods of Harris*, 1 Sw. and Tr., 536.

[4] *Townley* v. *Watson*, 3 Curt., 767, *In the goods of McCabe*, L. R., 3 P. and D. 94.

[5] 3 Curt., 767.

revocandi, several passages of her will, so that none of the parts of the will obliterated could be distinguished upon the face of the will, and it was held that there was a complete revocation as to the parts obliterated.[1]

The words "not apparent" in the English Wills Act, were held to mean not apparent on the face of the instrument itself and not capable of being made apparent by extrinsic evidence.[2] The wording of that Act has been varied in the Indian Succession Act, but the meaning appears to have been preserved.

Where a testator obliterates certain passages in his will so effectually that those passages cannot be made out on the face of the instrument itself, there is a complete revocation so far as the obliteration is concerned and the Will will be admitted to probate as if the passages were blank.[3] Neither the English nor the Indian Statute, it will be observed, draws any distinction between different modes of obliteration. So that, where a testator pasted over a whole legacy a piece of paper upon which, at some time about which the witnesses could give no information, he had written a new bequest, the Court refused to order the upper paper to be removed and directed probate to issue in blank as to that legacy.[4] It was never the practice, except in cases coming within the principle of dependent relative revocation, which applies also in the case of obliteration and interlineation,[5] to adopt any means of ascertaining what the words attempted to be obliterated were, other than the mere inspection by glasses. Chemical agents have never been resorted to to remove any portion of the obscuring ink, and HANNEN, J. expressed his opinion that it would be improper to adopt such means.[6] If a testator has covered over the amount of a legacy only, leaving the legatee's name untouched, the Court will consider it a case which comes under the principle of dependent relative revocation[7] and will endeavour to discover the amount of the legacy originally bequeathed by removing the upper paper.[8] Where a testator after the execution of his will partly erased the word *four* and substituted the word *five*, the alteration not being attested, the Court granted probate of the will as it originally stood, the word *four* being sufficiently apparent on the paper.[9]

There is a general presumption that where alterations are made in pencil

[1] Intestate and Testamentary Succession, p. 64.

[2] *Townley* v. *Watson*, 3 Curt., 761.

[3] *Townley* v. *Watson*, 3 Curt., 761, p. 769; *In the goods of Ibbston*, 2 Curt., 337.

[4] *In the goods of Horsford*, L. R., 3 P. and D., 211.

[5] *In the goods of McCabe*, L. R., 3 P. and D., 94.

[6] *In the goods of Horsford*, L. R., 3 P. and D., 211, p. 215.

[7] Supra p. 113.

[8] *In the goods of Horsford*, L. R., 3 P. and D., 211.

[9] *In the goods of Beavan*, 2 Curt., 369.

before execution, the will being written in ink, they are deliberative: where in ink, final and absolute.[1]

A will, notwithstanding that it contains blank spaces in the body of it,[2] or a blank page,[3] is entitled to probate.

In the case of a will prepared with blanks left for the names of legatees, or for the amounts of the legacies, if the blanks are afterwards found to have been filled up there is a presumption in the absence of evidence to the contrary, that the blanks were filled up before execution, as the will is incomplete without them.[4] In *Birch* v. *Birch*[5] blanks left for legacies had been filled up, some in black ink and some in red ink. The will, which was in black ink, had been found after the death of the testator in an envelope which appeared to have been sealed, re-opened, and resealed, and one of the schedules had been signed and dated in red ink with a date subsequent to that of the will. The Court presumed that the blanks filled up in black ink had been so filled up before execution, and those in red ink after execution. The mere circumstances, however, of the amount of a legacy or the name of the legatee being inserted in different ink and in different handwriting, does not alone constitute an obliteration, interlineation, or other alteration within the meaning of the statute, nor does any presumption arise against a will being duly executed as it appears,[6] for the will might have been brought to the testator with blanks and then filled up, and in a different ink. The case, however, is different, where there is an erasure apparent on the face of the will and that erasure has been superinduced by other writing. In such a case there is an obliteration and something more which constitutes an alteration, and it is now settled that, where there is no direct evidence to show when alterations have been made, the *primâ facie* presumption of law is that they were made after the execution of the will,[7] and such alterations are therefore inoperative, unless duly signed.[8] A marked distinction, it will be observed, exists between mere interlineations and alterations. Interlineations are generally used merely for the purpose of completing an imperfect sentence, whereas an alteration is a change in the original disposition. If interlineations merely supply blanks in the sense, or are required to make a sentence intelligible and

[1] *Hawkes* v. *Hawkes*, 1 Hagg., 321, Williams on Executors, 112: *Gann* v. *Gregory*, 3 D. M. and G., 780.

[2] *Corneby* v. *Gibbons*, 1 Rob., 705; *In the goods of Krby*, 1 Rob., 709.

[3] *In the goods of Wotton*, 3 P. and D., 159.

[4] *In the goods of Cadge*; L. R., 1 P. and D., 543; *Birch* v. *Birch*, 1 Rob., 675.

[5] 1 Rob. 675.

[6] *Greville* v. *Tylee*, 7 Moore's P. C., 320.

[7] *Cooper* v. *Bockett*, 4 Moore's P. C., 419; *Gann* v. *Gregory*, 3 D. M. and G., 777; *In the goods of James*, 1 Sw. and Tr., 238; *Greville* v. *Tylee*, 7 Moore's P. C., 320.

[8] *In the goods of Harris*, 1 Sw. and Tr., 536.

there is nothing to show that they were not made at the same time as the rest of the will, the Court will treat them as having been made before execution.[1]

The presumption of law, that, alterations, where there is no direct evidence to show when they were made, were made after the execution of the will, may be rebutted by evidence showing that it was highly probable that the alterations were made before the execution.[2] Thus, evidence may be given of declarations by the testator before he executed the will of his intention to provide for the person benefited by the alterations,[3] or where the name of an executor appeared over an erasure[4] to show that the alteration was made before execution.[5] Where, however, there are alterations made in a will, and there is a codicil which does not notice the alterations, the alterations are presumed to have been made after the codicil.[6] But where a codicil confirms alterations made in a will, the alterations, as they exist at the time of the codicil, are rendered operative.[7]

The mere fact that alterations in a will bear an earlier date than the will in the handwriting of the testator is not sufficient to show that such alterations were made before execution.[8]

At one time the rule in England was that declarations made before, but not after, the will was executed, were admissible.[9] But in the event of loss, it is now settled by the Court of Appeal, in the recent case of *Sugden* v. *Lord St. Leonards*,[10] that declarations, written or oral, made by a testator, both before and after the execution of his will, are admissible as secondary evidence of its contents. MELLISH, L. J., however, dissented from the judgement of the Court as to declarations made after the execution of the will.[11]

Statements, not merely with reference to the contents of a lost will but with reference to what papers constitute a will, are admissible[12] there being, it was held, no distinction between the case, where the question is what formed part of the will, and the case, as in *Sugden* v. *Lord St. Leonards*,[13] where the whole

[1] *In the goods of Cadge*, L. R., 1 P. and D., 543.

[2] *Keigwin* v. *Keigwin*, 7 Jur., 840.

[3] *Quick* v. *Quick*, 3 Sw. and Tr., 442.

[4] *In the goods of Sykes*, L. R., 3 P. and D., 26.

[5] See *Keen* v. *Keen*, L. R., 3 P. and D., 105.

[6] *In the goods of Countess of Morton*, 13 Jur., 1108; see *Rees* v. *Rees*, L. R., 3 P. and D, 84.

[7] *In the goods of Mills*, 11 Jur., 1070.

[8] *In the goods of Adamson*, L. R., 3 P. and D., 253.

[9] See *Doe* v. *Palmer*, 16 Q. B., 747; *Johnson* v. *Lyford*, L. R., 3 P. and D., 46; *Dench* v. *Dench*, L. R., 2 P. Div., 60.

[10] L. R., 1 P. D., 154.

[11] See Intestate and Testamentary Succession, p. 65.

[12] *Gould* v. *Lakes*, L. R., 6 P. Div., 1.

[13] L. R., 1 P. Div., 154.

will is lost. In a case where there was no evidence as to when certain trifling alterations and interlineations were made, save that of an expert, whose opinion was, that they were written at the same time as the rest, the will was admitted to probate with the alterations.[1]

Section 59 of the Indian Succession Act makes the following provision as to the revocation of privileged wills or codicils: "A privileged will or codicil may be revoked by the testator, by an unprivileged will or codicil, or by any act expressing an intention to revoke it, and accompanied with such formalities as would be sufficient to give validity to a privileged will, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same. *Explanation.*—In order to the revocation of a privileged will or codicil by an act accompanied with such formalities as would be sufficient to give validity to a privileged will it is not necessary that the testator should, at the time of doing that act, be in a situation which entitles him to make a privileged will." The section, strange to say, has been extended generally to Hindus, etc., by section 2 of Act XXI of 1870, although sections 52 and 53, which give the right to make privileged wills, have not been so extended.

A privileged will is also revoked by the marriage of the testator.[2]

Section 60 of the Indian succession Act, which corresponds with section 22 of the English Wills Act, with the addition of the words at the end "by the will or codicil" enacts that: "no unprivileged will or codicil, nor any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same, and when any will or codicil, which shall be partly revoked and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown by the will or codicil." An unprivileged will or codicil, therefore, cannot be revived by implication.[3] To satisfy the words 'show an intention to revive the same,' the intention must appear on the face of the codicil, either by express words referring to a will as revoked, and importing an intention to revive the same, or by a disposition of the testator inconsistent with any other intention, or by some

[1] *In the goods of Hindmarch*, L. R., 1 P. and D., 307; see *In the goods of Cadge*, L. R., 1 P. and D., 573, *supra*, where from the nature of certain interlineations, and the internal evidence furnished by the instrument itself, the Court concluded that they were made before execution.

[2] Indian Succession Act, s 56 This section does not apply, under Act XXI of 1870, to Hindus.

[3] See *In the goods of Steele*, 1 P. and D., 575.

other expression conveying to the mind of the Court, with reasonable certainty, the existence of the intention.[1] Therefore, the tying (*e. g.*, by a piece of tape) of a duly executed codicil of a later date to testamentary papers duly executed, but revoked, is no ground for inferring the 'intention to revive.'[2] So references in codicils to revoked wills by the dates have been insufficient to revive them, there being no evidence on the face of such codicils to revive the wills referred to.[3]

It being necessary that the intention to revive should appear on the face of the instrument, parol evidence is not admissible to show an intention on the part of the testator to revive a first will by destroying the second.[4] In *Major* v. *Williams*,[5] a testatrix duly executed a will, and, subsequently thereto, two other wills, in both of which was contained a clause revoking all other wills, and she afterwards destroyed the two latter wills. It was held, that the first will was not thereby revived; and parol evidence was not admitted to show an intention to revive it. So, parol evidence is not admissible to show that where a codicil expressly revives a will of a certain date, it was intended to revive a will of another date.[6]

A mere reference in a codicil to a revoked will by its date is insufficient to revive it.[7] A codicil, however, may incorporate a revoked will or any other document by a mere reference. In *In the goods of Reynolds*,[8] a testator executed a will in 1866 and a codicil to it in May 1871, and, in November 1871, executed a will which revoked all testamentary papers. In 1872 he executed a paper which was headed: "This is a codicil to the will of R dated May 1866," and which concluded with the appointment of the son as executor of the will and codicil, and the attestation clause commenced "codicil of the will of R dated May 1866 in the presence of etc." The Court held that the only intention to be gathered from the words in the codicil was that the testator intended to revive the will of 1866, but not the codicil of May 1871. In *In the goods of May*,[9] the testator made two wills, the latter revoking the former. Subsequently he made a codicil which he described as a "codicil to the last will

[1] *In the goods of Steele*, L. R., 1 P. and D., 575.

[2] *Marsh* v. *Marsh*, 1 Sw. and Tr, 528.

[3] *In the goods of Steele*, L. R., 2 P. and D., 575.

[4] *Major* v. *Williams*, 3 Curt., 432.

[5] 3 Curt., 432.

[6] *Lord Walpole* v. *Earl of Cholmondeley*, 7 T. R, 138; *In the goods of Chapman*, 1 Rob., 1; 1 Jarm., 146.

[7] *In the goods of Steele*, L. R., 1 P. and D., 575. But see *In the goods of Chapman*, 1 Rob. 1; *Payne* v. *Trappes*, 1 Rob. 583.

[8] L. R., 3 P. and D., 35

[9] L. R., 1 P. and D., 581.

of me, John May, of etc., and which bears date the 11th of January 1860" (the date of the former will which had been revoked). It was held that the codicil did not revive the revoked will or revoke the second. In another case[1] a codicil referred by date to a revoked will as the testator's last will and testament, but, notwithstanding this distinct reference, it was plain from the contents of the codicil itself, which referred to certain bequests, that it was really referring to a later will. The court treated the case as one of mistaken description and granted probate of the later will with the codicil.[2] In *In the goods of Stedman*,[3] the testator made a will on the 21st May 1877 disposing of his property among his six children, but by a subsequent will dated the 13th February 1878, he disposed of all his property in a different manner among his six children, thereby revoking the first will by implication. Subsequently, by the terms of a duly executed codicil he, by mistake, referred to the former will by date and also to its provisions instead of to the later will. The Court held that the codicil by its language revived the former will, and that as the later will was not revoked by the codicil all three documents must be admitted to probate.[4]

Where a testator by a codicil confirms his will, the will together with all previous codicils is taken to be confirmed.[5] In *Crosbie* v. *Macdowal*[6] the testator made a will and five codicils and a question rose as to the effect of the fifth codicil upon the fourth by which certain annuities had been given. The fifth codicil recited the making of the will and the date which it bore, substituted one executor in place of another, was silent as to all antecedent codicils and concluded by confirming the testator's said will. The Master of the Rolls held that the fourth codicil was not revoked by the fifth. A ratification of a will described by its date is a ratification of the will as modified by the codicils and therefore does not revoke the codicils which were made between the date of the will and the confirming codicil.[7]

The republication of a will is in effect the making of that will *de novo*—and no republication is effectual unless by re-execution.[8] In the case of *Dunn* v. *Dunn*,[9] A executed a will in 1837 appointing B, her nephew, an executor and residuary legatee. In 1861, she being desirous to deliver the will and her deeds to B, for safe custody, in the presence of a witness, C was sent for, and in

[1] *In the goods of Wilson*, L. R., 1 P. and D., 582.

[2] *In the goods of Wilson*, L. R., 1 P. and D., 582.

[3] L. R., 6 Ch. Div., 205.

[4] See also *In the goods of Dyke*, L. R., 6 P. Div., 207.

[5] *Green* v. *Tribe*, L. R., 9 Ch. D., 231.

[6] 4 Ves., 610.

[7] *Green* v. *Tribe*, L. R., 9 Ch. D., 231; *Crosbie* v. *Macdowal*, 4 Ves., 610.

[8] *Hobbs* v. *Knight*, 1 Curt., 768.

[9] L. R., 1 P. and D., 277.

his presence she delivered the will and deeds to B. Before delivery she subscribed her name at the foot of the will, and C and B subscribed theirs, the latter with the prefix 'executor.' A gave no reason for signing her name. It was held that this was not a re-execution.

A will which has been destroyed by the testator, or by his directions, *animo revocandi*, cannot be revised by a codicil[1] even, it seems, although the draft of the will may be in existence.[2] The destruction of a second will itself revoking one of prior date will not have the effect of reinstating the first will should it be in existence at the time of the testator's death.[3]

Where a testator gave £100 to his executor, and by a subsequent codicil gave him £500 in substitution for the first gift, and then revoked the second gift, it was held that the first gift was not set up again.[4] So, if a will give a legacy which was revoked or satisfied at the time of the codicil, the latter has not the effect of giving a fresh legacy.[5]

[1] *Rogers* v. *Goodenough*, 2 Sw. and Tr., 342—351.
[2] *Hall* v. *Tokelove*, 2 Rob., 318.
[3] *In the goods of W. Brown*, 1 Sw. and Tr., 32.
[4] *Boulcott* v. *Boulcott*, 2 Drew., 25.
[5] *Powys* v. *Mansfield*, 3 M. and C., 376.

LECTURE VI.

INDIAN SUCCESSION ACT—CONSTRUCTION OF WILLS.

Wills defined—Intention of testator to be gathered from will—Court cannot make new will for testator—Words introduced into wills by mistake, etc.—Words of art and legal phrases—"Heirs of body"—"All the rest"—Construction of words to which law has attached particular meaning—Canons of construction in England—Enquiries to determine questions as to object or subject of will—Admissibility of evidence where description does not accurately apply—where particular description applies to known object—Person answering description will not take, if not known to testator—Ambiguity as to objects—Nicknames—Blanks—Equivocation—Two persons answering same description—Evidence where meaning is doubtful—where no one answers description fully—Evidence of what is parcel or not parcel—*Falsa demonstratio non nocet*—Failure of bequest where no property answers description—Part of description when rejected—Misnomer—Misdescription of object—Bequest to certain number of children where there are others—Gift to reputed wife, as wife of A—Gifts to "children"—"my wife"—wife of A—"husband of A"—"eldest son"—"cousin"—Words omitted when supplied from context—Transposition and change of words—Correction of clerical errors—Latent ambiguity—Effect of blanks—Meaning of clause to be collected from entire will—Codicil is part of will—Words when taken in restricted sense—Gifts of residue—"Et cetra"—Words when taken in extended sense—"Effects," "worldly goods" etc.—Interpretation of clause open to two constructions—No part of will to be rejected—Rejection of words—Interpretation of words repeated in different parts of wills—Intention to be effectuated as far as possible—Inconsistent clauses—Uncertainty—Will speaks from testator's death—Interpretation of word "now"—Powers of appointment how executed—Implied gift in default of appointment—Implied gift arising from power—Bequests without words of limitation under Hindu law—Bequests to objects under description of relationship or membership of class—Bequests to "heirs" "relations" "family" etc.—to "representatives," "legal representatives," etc.

A will according to the definition to be found in the Indian Succession Act is the legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death. It is immaterial in what language a will is written, and it is not necessary, as we have seen[1] that a testator in making a will should use any technical words or terms of act, but only that the wording shall be such that the intentions of the testator can be known therefrom.[2]

[1] See *supra* p. 73.

[2] Indian Succession Act, s. 61. This section applies to Hindus etc, under the Hindu Wills Act. The rule is the same in England.—*Hay* v. *Coventry*, 3 T. R., 86, *per* LORD KENYON

The imperfections, however, of language are such that it is often a matter of great difficulty for Courts to determine what the intentions of the testator were, or what particular dispositions of his property he meant to make.

In England, certain fixed rules of construction have long been established by the decisions of the Courts for the guidance of Courts of construction in construing wills, and the rules formulated and laid down by the Indian Succession Act are for the most part based upon the English rules.

While the primary object in construing a will is to ascertain the intention of the testator, it has been said that the question in expounding a will is not what the testator meant, but what is the meaning of his words.[1] The use of the expression, said LORD WENSLEYDALE, that the intention of the testator is to be the guide, unaccompanied with the constant explanation that it is to be sought in his words, and a rigorous attention to it, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the question, which is what that which he has written means. The will must be expressed in writing and that writing only is to be considered.[2]

The Court, it has been frequently remarked, cannot make a will for the testator. It must construe the will he has made.[3] The proposition that the Court must take the words of the will as it finds them has been carried so far that it was laid down, in a case, where it was alleged that the intentions of the testator had not been rightly expressed by the draftsman whom he entrusted to prepare his will, that there is no difference between the words which a testator himself uses in drawing up his own will and the words which are *bonâ fide* used by one whom he has entrusted to draw up a will for him, and therefore probate cannot be granted omitting words alleged to have been wrongly introduced by the draftsman, even where it is alleged that, although the will might have been read over by or to the testator, the import of the words had not been intelligently appreciated by him.[4] There are few wills in which it might not be contended, even where the will was prepared by the testator himself, that the testator had not fully appreciated the words used in the will, and to allow such a contention would be to open out a large field for litigation.

If legal phrases or words of art are used, they are to be construed according to their technical sense, unless, upon the whole will, it is plain, that the testator did not so intend;[5] and the Court is bound to carry the will into effect, provided

[1] Wigram, p. 7, 2nd Edn.

[2] *Abbott* v. *Middleton*, 7 H. of L., 68, p. 114.

[3] *Robertson* v. *Broadbent*, L. R., 8 H. L. 62.

[4] *Rhodes* v. *Rhodes*, L. R., 7 H. L., 192.

[5] *Per* LORD ALVANLEY in *Thellusson* v. *Woodford*, 4 Ves., 329.

it is consistent with the rules of law;[1] and when a rule of law has affixed a certain determinate meaning to technical expressions, that meaning is to be given to them, unless the testator has, by his will, excluded, beyond all doubt, such construction.[2] Accordingly, where legal phrases or technical words only have been used, the Court has no right or power to say that the testator did not understand the meaning of the words used, or to put a construction upon them different from that which has been long received or which is affixed to them by law. But if the testator uses other words which manifestly indicate what his intention was and shows to demonstration that he did not mean what the technical words import in the sense which the law has imposed upon them, that intention must prevail, notwithstanding he has used such technical words in other parts of the will.[3] In *Jeeson* v. *Wright*,[4] the rule is thus laid down by LORD REDESDALE: technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise. Thus the words 'heirs of the body' will yield to a clear particular intent that the estate should be for life only, and that may be from the effect of superadded words or any expression showing the particular intent of the testator; but that must be clearly intelligible and unequivocal.

In *Doe* v. *Tofield*,[5] the words 'all my *personal* estates' were held to pass real property, it being apparent on the will that the testator did not mean what is technically understood as *personal* estate; and in *Attree* v. *Attree*,[6] where a testatrix, after a gift of her house and garden, which were leasehold, and several pecuniary legacies, directed that 'all the rest' should be divided between certain persons named, it was held, that the words 'all the rest' included realty as well personalty. So, where a testator gave two legacies and then gave his sheep and all the rest, residue, moneys, chattels and all other his effects to be equally divided among his four brothers, whom he appointed his executors, it was held that all the freehold, as well as personal, estate passed under the words used.[7] MALINS, V. C. said: "In the construction of wills it is the duty of the Court in the first place to ascertain from the words used by the testator what his meaning was and to give effect to that meaning, if words are to be found sufficient for the purpose * * * By these words 'I give all the rest, residue money, chattels and all other any effects' I am of opinion that the testator meant to include everything he had in the world whether real property or personal property and to pass all the

[1] *Ibid.*

[2] *Towns* v. *Wentworth*, 11 Moore's P. C., 543.

[3] *Per* BULLER, J., in *Hodgson* v. *Ambrose*. 1 Dougl., 341.

[4] 2 Bligh, 56 and 57. Intestate and testamentary Succession in India pp. 68, 69.

[5] 11 East, 246.

[6] L. R., 11 Eq., 280.

[7] L. R., 8 Ch., Div. 561.

residue of every kind soever not otherwise disposed of." The Privy Council in dealing with a case between Hindus thus expressed the rule to be applied: 'Primarily, the words of a will are to be considered, but the meaning to be attached to them may be affected by surrounding circumstances, among which is the law of the country in which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the disposition he has made, had regard to that meaning, or to that effect, unless the language of the will or the surrounding circumstances displace that assumption.'[1]

Besides the rules as to the case of technical words, to which I have referred, the following additional general rules of construction, most of which are reproduced with greater or less modification in the Indian Succession Act are to be found in Mr. Justice Williams' treatise on Executors, pp. 1085—1092, *viz.*:—

1. The construction of the will is to be made upon the entire instrument, and not merely upon disjointed parts of it; and consequently all its parts are to be construed with reference to each other.[2]

2. The Court is bound to give effect to every word, of the will without change or rejection, provided an effect can be given to it, not inconsistent with the general intent of the whole will taken together;[3] but if two parts of the will are totally inconsistent, the latter shall prevail.[4]

3. The will must be most favourably and benignly expounded to pursue, if possible, the intention of the testator.[5] To effectuate the clear intention of the testator as apparent upon the whole will, words and limitations may be transposed,[6] supplied,[7] or rejected,[8] but words in a will are not to be rejected unless there cannot be any rational construction of the words as they stand.[9]

4. Where words are capable of a two-fold construction, the rule is, even in the case of a deed, and much more in the case of a will, to adopt such a construction as tends to make it good.[10]

[1] *Sorjeemoney Dossee* v. *Denobundoo Mullick*, 6 Moore's I A., 526.

[2] Williams on Executors, p. 1085, see s. 69 of the Indian Succession Act.

[3] *Gray* v. *Minnethorpe*, 3 Ves., 105; *Hall* v. *Warren*, 9. H. of L., 420; Williams on Executors, 1088; see s. 72 of the Indian Succession Act.

[4] *Constantine* v. *Constantine*, 6 Ves., 102; see s. 75 of the Indian Succession Act.

[5] Touch. 431, 2 Black Com, 381.

[6] *Green* v. *Hayman*, 2 Chan. Ca., 10; *East* v. *Cook*, 2 Ves. Sen., 32.

[7] *Abbott* v. *Middleton*, 7 H. of L., 68; see Indian Succession Act, s. 64.

[8] *Boon* v. *Cornforth*, 2 Ves. Sen., 276; *Jesson* v. *Wright*, 2 Bligh, 1.

[9] *Chambers* v. *Brailsford*, 19 Ves., 654, *per* LORD ELDON; Williams on Executors, 1089; see ss. 72 and 74 of the Indian Succession Act.

[10] *Per* LAWRENCE, J. in *Thellusson* v. *Woodford*, 4 Ves., 312; see *Martelli* v *Holloway*, L.R, 5 H. of L., 532; Williams on Executors, 1092; see s. 71 of the Indian Succession Act.

5. The intention of the testator is not to be set aside, because it cannot take effect to the full extent, but it is to work as far as it can.[1]

6. In the construction of a will as to personalty made by a testator domiciled in a foreign country the *lex domicilii* must prevail, unless there is sufficient on the face of the will to show a different intention.[2]

7. A will of personalty speaks from the time of the testator's death.[3]

These rules have been fixed and settled by the authority of decided cases upon the construction of wills, yet ordinarily decided cases on the interpretation of words or phrases used in wills are not looked upon by Courts as affording much or reliable guidance in arriving at the construction to be put upon a particular will. To use the words of Lord Hatherly, "very little assistance can be derived in the construction of wills from authorities.

* The decided cases are landmarks to prevent any Court from assuming from a supposed intention, which may be apparent to the mind of one Judge and not so apparent to the mind of another, anything contrary to the settled construction of the particular class of words, unless there is something in the particular will which necessarily requires it.[4]

Section 62 of the Indian Succession Act enacts that, "for the purpose of determining questions as to what person or what property is denoted by any words used in a will, a Court must inquire into every material fact relating to the persons who claim to be interested under such will, the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact, a knowledge of which may conduce to the right application of the words which the testator has used."[5] It embodies the result of the cases under the English law.[6]

[1] *Per* BULLER, J., in *Thellusson* v. *Woodford*, 4 Ves., 325; see s. 72 of the Indian Succession Act.

[2] *Enohin* v. *Wylie*, 10 H. L., 1; see s. 5 of the Indian Succession Act, which applies on cases of testacy as well as of intestacy.

[3] See s. 77 of the Indian Succession Act.

[4] *Singleton* v. *Tomlinson*, L. R., 6 Ap. Ca. 404, p, 423.

[5] This section applies to Hindus, etc., under the Hindu Wills Act. The following illustrations are appended to the section. (*a.*) A, by his will, bequeaths 1000 rupees to his oldest son, or to his youngest grandchild, or to his cousin Mary. A Court may make inquiry in order to ascertain to what person the description in the will applies. (*b.*) A, by his will, leaves to B "his estate called Black Acre." It may be necessary to take evidence in order to ascertain what is the subject-matter of the bequest,—that is to say, what estate of the testator's is called Black Acre. (*c.*) A, by his will, leaves to B "the estate which he purchased of C." It may be necessary to take evidence in order to ascertain what estate the testator purchased of C.

[6] Williams on Executors, p 1158; see *Innes* v. *Sayer*, 3 Mac. and G., 606, 615; *Feltham's Trust*, 1 K and J, 528, *Bernasconi* v. *Atkinson*, 10 Hare, 345; *Jeffries* v. *Michell*, 20 Beav., 15; *Waterpark* v. *Fennell*, 7 H. of L., 650; *Garner* v. *Garner*, 29 Beav., 114, *Webber* v. *Stanley*, 16 C. B., N. S, 698; and *Charter* v. *Charter*, L. R., 7 H. L, 364.

In the case of *Charter* v. *Charter*,[1] it was held that evidence of the circumstances, the habits and the state of the family of the testator, at the time he made his will, was admissible, so as to put the Court in the position of the testator, in order to ascertain the bearing and application of the language which he had used, and to ascertain whether there existed any person or thing to which the whole description given in the will could, with sufficient certainty, be applied. But it was also held, in that case, that evidence of the declarations of the testator as to whom he intended to benefit, or supposed he had benefited, could only be received where the description of the legatee, or of the thing bequeathed, was equally applicable in all its parts to two persons or to two things. So, where a legacy was left by the testator to the children of his daughter by any husband other than Thomas Fisher, of B. street, Bath, and there was a Thomas Fisher of B. street, Bath, a married man, but there was also a Henry Tom Fisher, of B. street, Bath, his son, it was held, that although Thomas Fisher answered the description, and his son's name was not Thomas but Tom, parol evidence might be given to show which was intended.[2] And, where there was a bequest to a charitable society under a description which did not accurately apply to any particular society and a claim was made by two societies, each more or less answering to the description, evidence was admitted to show which of the two societies the testator knew, and to which of them he had subscribed.[3]

If a particular description fully applies to an object known to the testator, and to no other, there is no ambiguity, and evidence will not be admitted to show that there has been a mistake and that another object was meant. Thus, where a testator appointed as one of his executors, Francis Courtenay Thorpe of Hampton, and there was living a youth of 12 years of age to whom the name and description fully applied, the Court refused to admit evidence to show that the testator intended the father of the youth whose name was Francis Corbet Thorpe.[4] Where, however, there is an ambiguity, evidence will be admitted, as where a testator appointed as executor his nephew A B, and at the time of the execution of the will that there was living the son of the brother of the testator of that name, with whom, however, the testator was not on terms of intimacy, and there was also a person of the same name who was the nephew of the testator's wife, who had lived with him for many years and who latterly had managed his business, the Court received evidence of the circumstances in which the testator was placed at the time of the execution of the will, and of the sense

[1] L. R., 7 H. L., 364

[2] *In re Wolverton Estates*, L. R., 7 Ch. Div., 197; *Farrer* v. *St. Catherine's Coll.*, L. R., 16 Eq., 19.

[3] *In re Kilverts Trusts*, L. R., 7 Chan. 170.

[4] *In the goods of Peel*, L. R., 2 P. and D., 46; see *Holmes* v. *Custance*, 12 Ves., 279.

in which he was accustomed to use the term nephew, in order to ascertain the person indicated,[1] for when a word is used in a will as part of the description of a person specified by name, and is applicable to persons so named in an ordinary and popular sense as well as in a strict and primary sense, an ambiguity is raised.

Evidence will be admitted to explain a nickname[2] but not to fill up a blank.[3] But it has been held that a description by initials is a sufficient description, as where a legacy was to given to Mrs. G., and evidence will be admitted to show who was intended.[4]

In cases of an imperfect description, as where a blank is left for the Christian name, thus, "to Price the son of Price,"[5] or for the surname, thus, "to Percival ——— of Brighton"[6] the Court will admit evidence of circumstances under which the deceased made his will and of the persons about him, in order to satisfy itself who was meant by the imperfect description. But a legacy to Mr. ———[7] or to Lady ———[8] cannot have any effect given to it.

A testator clearly cannot be taken to have meant to benefit a person of whose existence he was not aware, even if that person fully answers to the description. In *Doe. d. Thomas* v. *Benyon*,[9] there was a devise to "Mary, Elizabeth and Ann, the daughters of Mary Benyon." At the date of the will Mary Benyon had two legitimate daughters, named Mary and Ann, living, and an illegitimate daughter, named Elizabeth. This illegitimate daughter claimed under the devise as one of the persons designated by the will and fully answering the description. Extrinsic evidence, however, was admitted to show that Mary Benyon, formerly had a legitimate daughter named Elizabeth who died some years before the executiou of the will, and that the testator did not know either of her death or of the birth of the illegitimate daughter.

When a legatee is once accurately described in a will, and the same name is again mentioned without any additional description or anything which can in any way apply to any other person, evidence is not admissible to show that a different person was intended, but the will must be read as having reference to

[1] *Grant* v. *Grant*, L. R., 2 P. and D., 8.

[2] *Beaumont* v. *Fell*, 2 P. Wms., 141; *Baylis* v. *Atty-General*, 2 Atk., 239.

[3] *Winn* v. *Littleton*, 2 Ch. Ca., 51; *Hunt* v. *Hort*, 3 Bro., C C., 311; *Baylis* v. *Atty-General*, 2 Atk., 239.

[4] *Abbott* v. *Massie*, 3 Ves., 148.

[5] *Price* v. *Page*, 4 Ves., 680.

[6] *In the goods of De Rosas*, L. R., 2 P. Div, 66; *Phillips* v. *Barker* 1 Sim. and G., 587.

[7] *Baylis* v. *Atty-General*, 2 Atk., 239.

[8] *Hunt* v. *Hort*, 3 Bro., C. C., 311.

[9] 12 Ad. and E., 431.

the same person who was before accurately described,[1] as where a person who had two neices, the daughters of different persons, one named Laura W. and the other, Laura F. T W, gave a legacy to "Laura W. the daughter of my brother J. H. W." and after certain other legacies, the residue to "Laura W." Cases, however, of this kind are to be distinguished from that of *Bennett* v. *Marshall*[2] in which there were two persons in the same degree of relationship to the testator one named William Marshall and the other William John Marshall. There it was decided that they were entitled both to be regarded as simply William Marshall and there was therefore a latent ambiguity, to remove which evidence was admitted to show which William Marshall was meant. So, in *Doe* v. *Allen*,[3] where the devise was to John, the grandson of B, charged with legacies to his brothers and sisters, and there were two grandsons of B, named John, one of whom had brothers and sisters, and the other had one brother and one sister, parol evidence was admitted in favour of the latter, the reference to the brothers and sisters being held to be no part of the description.[4]

If a testator has been in the habit of calling persons or things by particular names, evidence of this will in general be admissible.[5] If, however, words used have a meaning in ordinary language, and there is something to which they are appropriate, extrinsic evidence is not admissible to show that the testator used the words in a sense peculiar to himself.[6]

In *Millard* v. *Bailey*,[7] there was a bequest of 33 shares in the E. Gas Co. amongst the testator's four children, followed by a bequest of "the remaining shares" to her godchild. The number of shares held by the testator was 74, of which 37 were original paid up shares of £25 each, and 37 new £25 shares, on which £15 had been paid and which had been allotted to the original holders by way of bonus, a new share having been issued for each original share. Parol evidence was held not to be admissible for the purpose of showing that the testator was in the habit of treating and intended to treat the shares as double shares, so as as to pass to her godchild, by the residuary gift, four double and not forty-one single shares. Wood, V. C. said, "However much one may regret the result, I cannot treat the description of these shares as being of double and not of single shares. The authorities show that in particular countries there may be particular denominations used for measures of land or other things of universal application in the district, and that parol evidence is

[1] *Webber* v. *Corbett*, L. R., 16 Eq., 515; *Doe* v. *Westlake*, 4 B. and A., 57.

[2] 2 K. and J., 740.

[3] 12 A. and E., 451.

[4] See *Doe* v. *Westlake*, 4 B. and Ald., 57.

[5] *Lee* v. *Pain*, 4 Hare, 251.

[6] See *Millard* v. *Bailey*, L. R., 1 Eq, 378,

[7] L. R., 1 Eq., 378.

admissible for the purpose of explaining the custom of the district, or of the usage of the particular class of persons to whom the testator belonged. But, whereas, in this case, these new shares appeared on the register in different numbers from the original shares and one at least of the holders had dealt with them separately from his original shares, I cannot hold that there is any evidence admissible to shew that the shares were treated by all holders as double shares, I must take things as I find them, and I cannot allow particular expressions, said to have been used by the testatrix, to prevail where they are not the general language universally applicable to the particular subject matter."[1] Where the meaning of a will is doubtful, the Court may assist its construction by evidence of the state of the testator's property at the time when it was made, but where the words are plain, no such extrinsic aid can be resorted to to give them a different meaning.[2] If no one fully answers the name or description of the legatee under the will, the Court will receive evidence in order to ascertain whether there exists any person to whom the name or description can be reasonably and with sufficient accuracy applied.[3] Thus, where a testator appointed William McC. of Canonbury, executor, and the only persons at all answering the description were Thomas McC. and William Abraham McC., extraneous evidence was received shewing that the only person of the name of McC., with whom the testator was acquainted, was Thomas McC., and he was thus identified as the person intended by the testator.

If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect.[4] Thus, if A bequeaths to B "his marsh lands lying in L, and in the occupation of X" and the testator had marsh lands lying in L, but had no marsh lands in the occupation of X, the words "in the occupation of X" will be rejected as erroneous, and the marsh lands of the testator lying in L will pass by the bequest,[5] or, if the testator bequeaths to A "his zemindary of Rampore" and he had an estate at Rampore, but it was a taluk, and not a zemindary, the taluk passes by his bequest.[6]

The proposition just illustrated, lays down the maxim, *falsa demonstratio non nocet*, which was applied where there was a description consisting of separate parts,

[1] L. R., 1 Eq., pp. 381—2 See *Shore* v. *Wilson*, 9 Cl. and F., 558; *Crosley* v. *Clare*, 3 Sw., 320, n.

[2] *Hensman* v. *Fryer*, L. R, 3 Ch, 420; *Page* v. *Leapingwell*, 18 Ves., 466.

[3] *In the goods of Brake*, L. R., 6 P. Div., 217; *Charter* v. *Charter*, L. R., 7 E. and I. A., 364 p 377.

[4] Indian Succession Act, s. 65, which applies to Hindus, etc, under the Hindu Wills Act.

[5] *Ibid.* Illustration, (*a*).

[6] *Ibid.* Illustration, (*b*) *Day* v. *Trig*, 1 P. W., 286.

the first of which is complete and correct, and the second incomplete and incorrect.[1] The characteristic of cases within this maxim or rule, is that the description, so far as it is false, applies to no subject at all; and so far as it is true, applies to one only.[2] Thus, if property is known by a particular name, as 'White Acre,' and is devised by that name, it will be sufficient, although it may also be described as in the occupation of A and B, when in fact it is in that of A only.[3]

In *Sampson* v. *Sampson*,[4] under a devise of *four* messuages, five were, upon the context, allowed to pass. There the testator had given his four leasehold houses in Laxton Place. He had only four leases of those houses, but in those four leases were included five houses in Laxton Place, and it appeared on the face of the will that two were comprised in one lease. The Court held that he had mistaken the number of leases for houses.

As to the property the subject of the disposition, evidence is always admissible to show what is parcel and what is not. Thus where the testator devised his Briton Ferry estate with all manors, &c., and afterwards described it as in Glamorganshire, evidence was held to be admissible to show that it comprised other lands in Brecon.[5] So, evidence may be given to show that after acquired lands had been treated as additions to estates devised;[6] and, as a general rule, all facts relating to the subject matter of a devise or bequest, such as that it was or was not in the possession of the testator, the mode of acquiring it, the local situation and the distribution of the property may be enquired into.[7]

Where there is property answering the description given in the will only such property passes under the devise.[8] Accordingly, a devise of all the testator's land situate at G, in the occupation of S, will not also include land situate at G, but in the occupation of J.[9] Moreover, where a testator has devised all his lands at any particular place, extrinsic evidence is not admissible for the purpose of shewing that he intended to pass other lands not situated at that particular place, either by reason of such other lands having been enjoyed with the lands at the specified place for a lengthened period of time, or of the testator having dealt with them as one property, or of his having been in the habit of

[1] See *Morrell* v. *Fisher*, 4 Exch., 591; see also *West* v. *Lawday*, 11 H. L. C., 375.

[2] See *Webber* v. *Stanley*, 16 C. B., (N. S.), p. 755.

[3] *Blaque* v *Gold*, 4 Cro. Car., 447.

[4] L. R., 8 Eq., 479.

[5] *Doe* v. *Earl of Jersey*, 3 B. and C., 870.

[6] *Castle* v. *Fox*, L. R., 11 Eq., 542.

[7] *Doe d. Templeman* v. *Martin*, 4 B. and Ad, 771. See Indian Succession Act, s 62, which applies to Hindus, etc., under the Hindu Wills Act.—See Act XXI of 1870, s. 6.

[8] *Webber* v. *Stanley*, 16 C. B. N. S., 698.

[9] *Homer* v. *Homer*, L. R., 8 Ch. D, 758; *Morrell* v. *Fisher*, 4 Exch, 591.

referring to them as forming one property under one distinguishing name.[1] But a devise of lands "at or near A" will pass lands immediately adjoining in another parish.[2] In general, however, a misdescription of a tenure *e. g.* frehold for leasehold is immaterial, if in other respects it is clearly identified, and there is no other property correctly answering the description in the will.[3] Nothing, it has been said, is better settled than that, when a testator gives freehold estate at a particular place and it turns out that he has no freehold estate at that place, but he has leasehold estate, the leasehold estate will pass, and if he has lands in fee and lands for years, and devises all his lands and tenements, the fee simple lands pass only, and not the leases for years, but if he has no fee simple, the leases for years will pass.[4]

Where there is no property which at all answers to the description in the will the bequest fails entirely.[5]

It is a recognized principle in case of ambiguous description, that where there are several terms of description applied to the subject-matter of a devise or bequest, every such term may be material, and, if there is property corresponding with that which is devised in every particular, such property alone will pass to the exclusion of other property *in part only* answering the description. For instance, where the testator recited that he was seised of certain lands at A subject to a mortgage, and he devised the said lands, this was held not to include lands at A which were not mortgaged.[6] The principle has been followed in section 66 of the Indian Succession Act which is as follows: "If the will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such property, and it shall not be lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply. *Explanation.*—In judging whether a case falls within the meaning of this section, any words which would be liable to rejection under the sixty-fifth section are to be considered as struck out of the will."[7]

[1] *Doe* v. *Greening*, 3 M. and S., 171; *Doe* v. *Barford*, 4 M. and S., 550; *Doe* v. *Chichester*, 4 Dow., 65; See *Doe* v. *Earl of Jersey*, 3 B. and C., 870.

[2] *Homer* v. *Homer*, L. R., 8 Ch. D., 758.

[3] *Gully* v. *Davis*, L. R., 10 Eq., 562; *Hall* v. *Fisher*, 1 Coll., 47.

[4] *Gully* v. *Davis*, L. R., 10 Eq, 562; *Rose* v. *Bartlett*, Cro. Car, 292.

[5] *Barber* v. *Wood*, L. R., 4 Ch. D., 885.

[6] *Pullin* v. *Pullin*, 3 Bing., 47; *Smith* v. *Ridgway*, L. R., 1 Exch. Ch., 331. See, however, *Goodtitle* v. *Southern*, 1 M. and Sel., 299; *Down* v. *Down*, 7 Taun., 343, in the former of which cases, under the description of "my farm of White Acre in the occupation of A," other lands, part of the farm not A's occupation, were held to pass.

[7] This section applies to Hindus, etc., under the Hindu Wills Act. The illustrations to the section are as follows: (*a*). A bequeaths to B "his marsh lands lying in L, and in the

Section 63 of the Indian Succession Act provides that where the words used in the will to designate or describe a legatee, or a class of legatees, sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect; and that a mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name, and the following illustrations are appended: (*a*) A bequeaths a legacy "to Thomas, the second son of his brother John." The testator has an only brother, named John, who has no son named Thomas, but has a second son, whose name is William. William shall have the legacy.[1] (*b*) A bequeaths a legacy "to Thomas, the second son of his brother John." The testator has an only brother, named John, whose first son is named Thomas, and whose second son is named William. Thomas shall have the legacy.[2] (*c*) The testator bequeaths his property "to A and B, the legitimate children of C." C has no legitimate child, but has two illegitimate children, A and B. The bequest to A and B takes effect, although they are illegitimate.[3] (*a*) The testator gives his residuary estate to be divided among "his seven children," and proceeding to enumerate them, mentions six names only. This omission shall not prevent the seventh child from taking a share with the others (*e*) The testator having six grandchildren, makes a bequest to "his six grandchildren," and proceeding to mention them by their Christian names, mentions one twice over, omitting another altogether. The one whose name is not mentioned shall take a share with the others.[4] (*f*) The testator bequeaths "1,000 rupees to each of the three children of A." At the date of the will, A has four children. Each of these four children shall, if he survives the testator, receive a legacy of 1,000 rupees.[5]

occupation of X." The testator had marsh lands lying in L, some of which were in the occupation of X, and some not in the occupation of X. The bequest shall be considered as limited to such of the testator's marsh lands lying in L as were in the occupation of X.

(*b*). A bequeaths to B "his marsh lands lying in L, and in the occupation of X, comprising 1,000 bighas of land." The testator had marsh lands lying in L, some of which were in the occupation of X, and some not in the occupation of X. The measurement is wholly inapplicable to the marsh lands of either class or to the whole taken together. The measurement shall be struck out of the will, and such of the testator's lands lying in L, as were in the occupation of X, shall alone pass by the bequest.

The second of those illustrations follows the case of *Morrell* v. *Fisher*, 4 Exch., 591.

[1] *Stockdale* v. *Bushby*, 19 Ves, 381; see *Mostyn* v. *Mostyn*, 17 Beav., 323.

[2] *Newbolt* v. *Price*, 14 Sim., 354; see *Gillett* v. *Gane*, L. R., 10 Eq., 29; *In re Nunn's Trusts*, L. R, 19 Eq., 331.

[3] *Standen* v. *Standen*, 2 Ves, 589.

[4] *Garth* v. *Meyrick*, 1 Bro., C. C., 30.

[5] *Tomkins* v. *Tomkins*, 9 Ves. Sen., 564; *Garvey* v. *Hibbert*, 19 Ves, 124.

In applying section 63, under the Hindu Wills Act, in which it has been embodied, the words 'son,' 'sons,' 'child,' and 'children' include an adopted child; and the word 'grandchildren' includes the children, whether adopted or natural-born, of a child, whether adopted or natural-born; and the expression 'daughter-in-law' includes the wife of an adopted son.[1]

The general rule, as stated by Mr. Justice Williams is, that where the name or description of a legatee is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake does not disappoint the bequest. The error may be rectified and the true intention of the testator ascertained by the context of the will, or to a certain extent by oral evidence.[2] So; where there is no doubt as to the person intended, a misdescription of character will not frustrate the bequest, unless the false character attributed by the testator has been acquired by fraud, which has deceived the testator.[3] If fraud, however, is alleged, it must be raised in the Probate Court and not in the Court which has to construe the will.[4] It was held that a reputed wife of the testator will take a legacy under the description of a wife, as if she had actually filled the character of lawful wife;[5] but where a legacy was given by a woman to a man, whom she believed to be her husband, a character which he had falsely assumed, the Court held, that the legacy did not pass.[6]

In cases where a legacy is given to a person under a particular character which has been falsely assumed, the Court must be satisfied that the assumed character was the motive for the bounty before it deprives a legatee of the legacy.[7] In *Schloss* v. *Stiebel*,[8] a testator, after mentioning A. S., whom he was engaged to marry, by name, and alluding to his intended marriage, bequeathed £3,000 to my wife, and A. S. was held entitled to the legacy.[9]

In *Boddington* v. *Clairat*,[10] the testator after giving a legacy of £200 to his wife directed his trustees, in addition thereto, to pay to "my said wife so long as she shall continue my widow and unmarried" an annuity of £200. After the date of the will the marriage was declared null by the Divorce

[1] Act XXI of 1870, s. 6.

[2] Williams on Executors, 1156. See also 1 Jarm., pp. 376—383.

[3] *Giles* v. *Giles*, 1 Keen, 685.

[4] *Meluish* v *Milton*, L. R., 3 Ch. D., 27.

[5] *Ibid*; *Pratt* v. *Mathew*, 22 Beav., 334.

[6] *Kennell* v. *Abbott*, 4 Ves, 802; see also *Meluish* v. *Milton*, L. R., 3 Chan. Div., 27; *Allen* v. McPherson, 1 H. L. C., 191.

[7] *Rishton* v. *Cobb*, 5 My. and Cr., 150; see *Boddington* v *Clairat*, L. R., 25 Ch. D., 685.

[8] 6 Sim., 1.

[9] See Intestate and Testamentary Succession in India, pp 72—73.

[10] L. R, 25 Ch. D., 685.

Court in a suit brought by the wife against the testator. The Court held that, although, if the lady had been the testator's wife at his decease, the words "shall continue my widow and unmarried" might have been in substance the same as shall continue unmarried, the reference to widowhood could not on that ground be treated as surplusage, but was the principal part of the condition and that as the lady did not, at the testator's death, fill the position of the testator's widow she could not take the annuity. Evidence of incontinence, however, it has been held, is not admissible to defeat a legacy to the wife of the testator under the description of his chaste wife.[1]

Where a testator, after giving pecuniary legacies to servants who were described as having lived many years in his family, gave a legacy to "the other servants" it was held that the latter bequest took effect in favour of the servants at the date of the will, although they had quitted the service before the death of the testator.[2] The term servants is not confined to servants resident in the house, but applies equally to out-door servants such as bailiffs, land-stewards or gardeners,[3] but not to a boy employed only occasionally.[4]

In a case where the testator bequeathed "to the two sons and the daughter of A. B. £50 apiece" and at the date of the will and of the death of the testator, A. B had one son and four daughters, it was held that each of these five children was entitled to a legacy of £50.[5] And, under a bequest to the *four* sons of A, he having three sons and a *daughter*, the daughter was held to be entitled as well as the sons.[6] So, in *Garvey* v. *Hibbert*[7] where the legacy was "to the three children of A the sum of £600 each" and there were four children of A all born before the date of the will, it was held that all four were entitled to £600 each. The ground upon which the Court proceeded was that there had been a mere slip in expression made by the testator. As pointed out in a note to the report of the case, it is certainly more easy to infer an error in the description of the class of legatees, either from an imperfect knowledge of them if not connected with the testator, or from mere inadvertence, than to conceive that in adopting this form of legacy the testator meant to exclude a particular individual.

A gift "to my wife A" will not fail, though the wife may have, after the execution of the will, procured a divorce.[8]

[1] *Kennell* v. *Abbott*, 4 Ves., 809.

[2] *Parker* v. *Marchannt*, 1 Y. and C., C. C., 290.

[3] *Thrupp* v. *Collett*, (No. 2) 26 Beav., 147; *Armstrong* v. *Clavering*, 27 Beav., 226.

[4] *Thrupp* v. *Collett*, 26 Beav., 147.

[5] *Harrison* v. *Harrison*, 1 Russ. and My., 72.

[6] *Lane* v. *Green*, 4 DeG., and Sm., 239.

[7] 19 Ves., 125.

[8] See *In re Boddington*, L. R., 25 Ch. D., 685.

Where there is nothing to indicate that a person, described as the wife of a particular person, but who is not the wife of that person, was personally known to the testator or known to him in such a way as to lead to the inference that she was intended by the testator, a gift to a wife must be taken to mean lawful wife[1] as where the bequest was to the testator's nephew for life, and after death to his wife for life, and afterwards to her children, and the nephew died unmarried in the lifetime of the testator, but leaving a woman who was reputed to be his wife. In that case, if the nephew had survived the testator and had married, there would have then been a person exactly answering the description in the will. Where there is a gift "to my wife", the testator must be taken to consider that there was some person who could take under that designation. He cannot be supposed to refer to any future wife whom he might marry, for a subsequent marriage would revoke the will. Accordingly, under such a gift a reputed wife,[2] or a deceased wife's sister, whom he may have married, would be entitled to take.[3]

A gift to the wife of a third person *primâ facie* is a gift to the person who was the wife of that person at the date of the will and not an after taken wife.[4] In like manner, it has been held, where a testator referred to his five daughters as the wives of five persons named and gave life-interests in separate legacies to his five daughters and afterwards to their respective husbands, that the gift to the husbands was confined to their then existing husbands.[5] A gift to the husband of an unmarried woman vests in her first husband,[6] and it has been held, where a testator devised property to his unmarried daughter for life, and after her death in trust for "any husband with whom she might intermarry for his life" that the husband was entitled to the property although he had been divorced and married again.[7]

In the absence of a context showing a contrary intention the word "unmarried" must be construed according to its ordinary or primary meaning as "never having been married"[8] and accordingly, where property was given by will in trust for A for life "but if he should die unmarried" to be equally divided among the children of B, and A, at the date of the will was a bachelor, but at the time of the testator's death was a widower, it was held that the gift to

[1] *Re Davenport's Trust*, 1 Sm. and G., 126.
[2] *In re Petts*, 27 Beav , 576.
[3] *Pratt* v *Mathew*, 22 Beav., 328, p. 335.
[4] *Boreham* v. *Bignell*, 8 Hare, 131.
[5] *Franks* v. *Brooker*, 27 Beav., 635.
[6] *Radford* v. *Willis*, L. R., 7 Ch., 7.
[7] *Bullamore* v. *Wynter*, L. R., 22 Ch. D., 619.
[8] *Clarke* v. *Collis*, 9 H. L., Ca., 601; *In re Sergeant*, L. R , 26 Ch. D., 575.

the children of B did not take effect.[1] The word "unmarried," however, is one of flexible meaning and may be held to mean "not having a husband,"[2] Thus, where there was a gift to A, if she be "sole and unmarried" and A married, but was divorced during the lifetime of the testator, it was held that she was entitled to the gift.[3]

In the case of a gift to "a son" or "a child" of a person, it will go to the son or child, as the case may be, if there is one in existence at the time of making the will, or, if there is no son or child, it will go to the first son or child who comes into existence.[4] Thus, where a testator devised a freehold estate for life to A, and after his death he devised the same to be equally divided into four parts between one child of A, one child of B, one child of C, and one child of D, for them to receive the rents and divide the money between them: and, provided A, B, C and D should never have any lawful children, the testator's desire was that their shares should go to their next of kin, and at the time of making the will and of the death of the testator, B only had a child, namely, a daughter, but after the testator's death B had a son, and at the death of A there were children, both sons and daughters of A, C and D, it was held that the gift to one "one child" was not void for uncertainty and that the eldest child of A, C and D, respectively, whether a son or daughter, who came into *esse* after the testator's death were entitled.[5] So in *Ashburner* v. *Wilson*,[6] where there was a devise to several persons for life and, after the death of the surviving tenant for life, to a son of A, the testator's nephew, it was held that this was a gift to the first-born son of the nephew.

Except in cases of portions or of a specially qualifying text "eldest son" means firstborn son.[7] The term "younger son" similarly, is to be construed in its primary signification.[8] This construction, however, is excluded if the eldest or first or second born is, to the testator's knowledge, dead, or if he speaks of a son who is not first born as "becoming eldest," or of the eldest at a given period, or for the time being.[9]

In a case where the testatrix gave a share of her residue to her "cousin *Harriet Cloak*," it appeared that she had no cousin of that name, but she had

[1] *Dalrymple* v. *Hall*, L. R, 16 Ch. D, 715.

[2] *In re Sergeant*, L. R. 26 Ch. D., 575.

[3] *In re Lesingham's Trust*, L. R., 24 Ch. D., 703.

[4] *Powel* v. *Davies*, 1 Beav., 532.

[5] *Ibid.*

[6] 17 Sim., 204.

[7] *Meredith* v. *Treffry*, L. R., 12 Ch. D., 170; *Wilbraham* v. *Scarisbrick*, 1 H. L. C., 167.

[8] *Ibid.*

[9] 2 Jarm, 213; *King* v. *Bennett*, 4 M. and W., 36; *Bathurst* v. *Errington*, 2 App, Ca., 698 and 709; *Livesey* v. *Livesey*, 2 H. L., Ca., 419; *Bowles* v. *Bowles*, 10 Ves., 177.

a married cousin, Harriet Crane, whose maiden name was *Cloak*, and she had a cousin *J. Cloak* whose wife's name was *Harriet*, extrinsic evidence was admitted to show the testator's knowledge of, and intimacy with, the members of the *Cloak* family, and the Court, considering that "cousin" might be understood in the popular sense as the wife of a cousin, held that Harriet the wife of *J. Cloak* was entitled to the share of the residue.[1]

Where any word material to the full expression of the meaning has been omitted from the will, it may be supplied from the context,[2] but it must be clear from the context itself what the omitted word or words are. Thus, where a testator gives a legacy of "five hundred" to his daughter A and a legacy of "five hundred rupees" to his daughter B, A will take a legacy of five hundred rupees.[3] No words, however, can be supplied or rejected, unless there cannot be any rational construction of the words as they stand,[4] the general rule being, as we have seen, that words in general are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected.[5]

In *Kirkpatrick* v. *Kirkpatrick*,[6] where there was a gift to A and B, and if either died under *twenty-one and without issue*, the share to go to the other, and if both died without issue, over, the words '*under twenty-one*' were supplied in the latter part. So, where there was a gift of the interest of a sum of money to A for life, then to B for life, and on his death, the principal to go to *his child or children*, but in case of B dying before A, the principal to go over, the words 'without *leaving any child*' were supplied.[7] Again, the words '*without issue*' have been read as '*without leaving* issue.'[8]

In some cases words of limitation have been supplied;[9] also words of inheritance, as where, under a limitation to the first son and for default of such issue to the second, third, and every other son, and the heirs of his or their bodies, the will was read so as to include the heirs of the body of the first son, as well as of the other sons.[10] So, if a testator arranges the clauses of his will

[1] *In re Taylor, Cloak* v. *Hammond*, L. R., 34 Ch. D., 255; see *Grant* v. *Grant*, L. R, 5 C. P., 727.

[2] Indian Succession Act, s. 64, which applies to Hindus, etc., under the Hindu Wills Act.

[3] Indian Succession Act, s. 64, illustration.

[4] *Chambers* v. *Brailsford*, 19 Ves., 654, *per* LORD ELDON; see Williams on Executors, 1089.

[5] See *George* v. *George*, 6 All., H. C. R., 219.

[6] 13 Ves., 476.

[7] *Abbott* v. *Middleton*, 7 H. L. C., 68.

[8] *Radford* v. *Radford*, 1 Keen, 486; see *Lang* v. *Pugh*, 1 Y. and C., 718, where '*on marriage*' was read as '*at* 21 *or marriage*.'

[9] *Langston* v. *Langston*, 2 Cl. and Fin., 194.

[10] *Galley* v. *Barrington*, 2 Bingh., 387.

in numerical order, words of limitation *at the end* of each clause may be held to have reference to all the antecedent devises *in that clause.*[1]

When it appears from the context of a will that a word has been incorrectly employed for another word the Court will in some cases change the word in order to effectuate the clear intention of the testator.[2] Thus where a testator in a will which contained a number of schedules referred to the fifth schedule when it was clear he meant the fourth, the Court allowed the mistake to be corrected.[3] In several cases "or" has been read as "and"[4] and *vice versâ.*[5]

In *In re Redfern,*[6] the testator having two sons and five daughters, divided his property into sevenths, and bequeathed one-seventh to one son, and another seventh to the other son. He then bequeathed the "remaining five sevenths," during the respective lives of his daughters A, B, C, D, and E, in equal shares, for their separate use. He then, after the death of A, gave one-fifth of the fund to the children of A; after the death of B, one-fifth to the children of B; after the death of C, one-fifth to the children (not of C, but) of D; and after the death of E, one-fifth to the children of E, with power to the trustees "until the *share* of the said trust-monies of the issue of any of my said daughters should become payable, to apply the same by way of maintenance." BACON, V. C. held, that a trust, similar to that which was given to the children of the other four daughters had been accidentally omitted, and must be implied after the death of C for the children of C. He observed, that the testator having seven children had made an equal division of all his estate among them. That was the plain meaning and intention of the will. The two sons had been given their shares without limitation. The daughters' interests, which were for life in equal shares, he protected against marital influence; and then he provided, or intended to provide, that, upon their death, their children should succeed to their shares. "I am," he said, "to gather the meaning of the testator from the words in which he has expressed his meaning—I am not to be deterred by any accidental omission from putting the true signification on the will, and I am not to substitute what some blundering attorney's clerk or law-stationer has written in the will, and treat that blunder as if it was the intention of the testator."[7]

[1] *Collings* v. *Eustace,* 4 M. and Sel., 58. Intestate and Testamentary Succession in India, p. 74.

[2] *Moseley* v. *Massey,* 8 East., 149; *Doe* v. *Allcock,* 1 B. and Ald., 137.

[3] *Hart* v. *Tulk,* 2 De G. M. and G., 300.

[4] See *Walsh* v. *Peterson,* 3 Atk., 193; *Greated* v. *Greated,* 26 Beav. 621.

[5] *In re Saunders,* L. R., 1 Eq., 673; *Kilbude's Trust,* L. R., 2 Eq., 400; *Hetheringham* v. *Oakman,* 29 Y. and C. (Ch.), 299. See *Day* v. *Day,* Kay., 703; *Hawksworth* v. *Hawksworth,* 27 Beav., 1; *Magnard* v. *Wright,* 26 Beav., 285.

[6] L. R., 6 Chan. Div., 133.

[7] See *supra,* pp. 84, 85.

Somewhat similar principles were acted upon in *Sweeting* v. *Prideaux*;[1] in *In re Daniel's Settlement*;[2] in *Greenwood* v. *Greenwood*;[3] in *Re Northern's Estate*;[4] and in *Mellor* v. *Daintree*.[5] It is not, however, to be inferred from cases of this kind, that words may be inserted upon mere conjecture, in order to equalize estates created by several distinct and independent devises in favour of persons with respect to whom the testator has expressed no uniformity of purpose, though it may reasonably be conjectured that he had the same intention as to all.[6]

In *Mellor* v. *Daintree*,[7] NORTH, J. discussed at considerable length the principles upon which the Court acts in supplying by reference an omission in a will. There the testator devised and bequeathed his real and personal estate to trustees, on trust, as to one moiety of the personalty and a specific part (being about half in value) of his realty, to accumulate the income, until B should attain twenty-five or die, whichever should first happen, in case either of such events should happen within twenty-one years from his own death, but, in case that period should expire before either of such events should happen, upon trust, to pay the income to B, if living, from the expiration of such period, until he should attain twenty-five or die, whichever should first happen, and, subject as aforesaid, the testator directed the moiety should be held in trust for B absolutely, in case he should attain twenty-five, and, in case he should die under twenty-five, leaving a son or sons him surviving, who, or any one of whom, should attain twenty-one, the moiety was, subject as aforesaid, to be held in trust for the only, or if more than one, the first surviving son of B, who should attain twenty-one. And, the testator directed that the second moiety of the personalty and the rest of the realty should be held in trust to accumulate the income until D should attain twenty-five or die, whichever should first happen within the period of twenty-one years from his own death, and, in case that period should expire before either of such events should happen, then upon trust to pay the income to D (if living) from the expiration of such period until he should attain twenty-five or die, whichever should first happen, and, subject as aforesaid, the testator directed that the moiety should be held in trust "for such only surviving son, or if more than one surviving son, for the eldest of such surviving sons absolutely." But, in case D should leave no son him surviving, the property was to be held in trust for R absolutely. B was a stranger in blood

[1] L. R., 2 Chan. Div., 413.
[2] L. R., 1 Chan. Div., 375.
[3] L. R., 5 Chan. Div., 954.
[4] L. R., 28 Ch. D., 153.
[5] L. R., 33 Ch. D., 198.
[6] 1 Jarm., 495 (4th Edn.); Intestate and Testamentary Succession in India, p. 73.
[7] L. R., 33 Ch. D., 198.

to the testator; D was the testator's nephew. D atttained twenty-five. It was held, that, having regard to the whole scheme of the will, an absolute gift of the second moiety to D at twenty-five must be implied.

Omissions may be supplied in the case of independent gift to strangers as well as in the case of a series of gifts to children of a testator or to members of a class.[1]

In *Thellusson* v. *Lord Rendlesham*,[2] LORD CRANWORTH said the rule universally recognised and acted upon is that "words are to be construed according to their plain ordinary meaning, unless the context shews them to have been used in a different sense, or unless the rule, if acted upon, would lead to some manifest absurdity or incongruity," and acting upon, this principle, Chitty, J., inserted the words "the said Croxton estate" in place of the words "the said Lea Knowl estate," where it appeared that the latter words had been inserted in a will through an obvious clerical error, and the proper correction could be gathered from the context.[3]

We have already seen how, under s. 62 of the Indian Succession Act, an inquiry may be made into the facts and circumstances respecting the property and the family of the testator for the purpose of determining questions as to what person or property is denoted by any words in the will. The general rule, however, is that parol evidence of the testator's intention is not admissible, unless there is a latent ambiguity, and section 67 of the Indian Succession Act provides that "where the words of the will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended."[4] If the description in the will applies partly to one person and partly to another, evidence is not admissible to show whom the

[1] *Ibid.*

[2] 7 H. L. Ca., 429.

[3] *In re Northern's Estate, Salt* v. *Pym*, L. R., 28 Ch. Div., 153; See *Rhodes* v. *Rhodes*, L. R., 7 Ap. Ca., 192.

[4] This section applies to Hindus, etc., under the Hindu Wills Act. The following illustrations are appended to the section:

(*a*). A man having two cousins of the name of Mary, bequeaths a sum of money to "his cousin Mary." It appears that there are two persons, each answering the description in the will. That description, therefore, admits of two applications, only one of which can have been intended by the testator. Evidence is admissible to show which of the two applications was intended.

See *Doe d. Hiscocks* v. *Hiscocks*, 5 M. and W., 363; *Fleming* v. *Fleming*, 1 H. and C., 242; *Grant* v. *Grant*, L. R., 5 C. P., 727; see *In re Taylor*, L. R., 34 Ch. D., 255.

(*b*). A, by his will, leaves to B "his estate called Sultanpur Khurd." It turns out that he had two estates called Sultanpur Khurd. Evidence is admissible to show which estate was intended.

testator meant to benefit,[1] and, if the description does apply to one person and that person is known to the testator. parol evidence is not admissible to show that another person, who does not answer the description, was intended.[2] If no person properly answers the description, evidence is, in general, inadmissible.[3] In *Ogle* v. *Lord Sherborne*,[4] it was held that a bequest of a silver cup to Lord Sherborne lapsed, where the person who was Lord Sherborne at the date of will died before the testator, leaving a successor to the title. In *In re Taylor*,[5] to which reference has already been made,[6] under a gift to the testator's "cousin Harriet Cloak" extrinsic evidence having been admited as to the testator's knowledge of the Cloak family, one Harriet Cloak, the wife of a cousin named Cloak was held to be entitled to the exclusion of a married cousin named Harriet Crane, but whose maiden name had been Harriet Cloak.

Where there is an ambiguity or deficiency on the face of the will no extrinsic evidence as to the intention of the testator shall be admitted.[7] Thus, where a man who had an aunt Caroline and a cousin Mary, but had no aunt of the name of Mary, by his will bequeathed 1,000 rupees to "his aunt Caroline," and 1,000 rupees to "his cousin Mary," and afterwards bequeathed 2,000 rupees to "his before mentioned aunt Mary," there being no person to whom the description given in the will could apply. evidence was not admissible to show who was meant by "his before mentioned aunt Mary" and the bequest was therefore void for uncertainty.[8] So, if a blank is left for the name of the legatee, as where A bequeaths 1,000 rupees to ————,[9] or the amount or specification of the legacy or devise is left blank, as, where A bequeaths to B ———— rupees or "his estate of ————",[10] evidence is not admissible to show what name, or what sum, or what estate the testator intended to insert. But, although where blanks are left for the names, the bequest is void for uncertainty,[11] yet where names of some of the persons to whom a gift is made are left blank, the whole bequest will not be void.[12]

[1] *Doe d. Hiscocks* v. *Hiscocks*, 5 M. and W., 363; *Garner* v. *Garner*, 29 Beav., 114.

[2] *Delmare* v *Robello*, 1 Ves., 412; *In the goods of Peel*, L. R., 2 P and D., 46.

[3] *Drake* v. *Drake*, 8 H. C. L., 172; see *Mostyn* v. *Mostyn*, 5 H. L. C., 168.

[4] L. R., 34 Ch. D., 446.

[5] L. R., 34 Ch. D., 255.

[6] Supra p. 144.

[7] Indian Succession Act, s. 68 which applies to Hindus, &c., under the Hindu Wills Act; *Edmunds* v. *Waugh*, 4 Drew., 275, 278.

[8] Indian Succession Act, s. 68, illustration, (*a*) see s. 76.

[9] Indian Succession Act, s. 67, illustration, (*b*).

[10] *Ibid*, illustration, (*c*).

[11] *Greig* v. *Martin*, 5 Jur. N. S., 329; *Baylis* v. *Attorney-General*, 2 Atk, 239; *Hunt* v. *Hort*, 3 Bro. C. C., 311; see *supra*, p. 135.

[12] *Gill* v. *Bagshaw*, L. R., 2 Eq., 746

In *Price* v. *Page*,[1] where there was a blank for the Christian name only, evidence was allowed to show that the claimant was entitled. In the case of a blank for, Christian name, though the ambiguity would appear to be really patent, when evidence has been admitted for the purpose of supplying such a blank, it appears not to have been evidence of intention, but evidence of collateral matters, to show who was intended.[2] So parol evidence, we have seen, was admitted to show who was intended to be benefitted by a legacy to "Mrs. G."[3]

In a very recent case,[4] a testatrix, who made her will on a printed form, after giving certain legacies, gave all her estate real and personal "unto to and own use and benefit absolutely," and then appointed A to pay all her debts etc. and to be executor of her will. The testatrix was illegitimate and left no issue or next of kin. The Crown and the executor claimed the residue, and evidence was tendered by the executor to prove that the intention of the testatrix was that he should take the residue, if any, for his own benefit, and the Court held that under the peculiar circumstances parol evidence was admissible to rebut the presumption against the executor arising from the blanks in the will, and that the executor was, subject to the payment of costs, entitled for his own benefit to what should remain.[5] Evidence is admissible to show that an instrument on the face of it of a testamentary character was not intended to operate as a will.[6] Evidence is also admissible to show that a mistake has been made. Thus, where a testator executed a will and five codicils, and the fourth codicil revoked the three prior codicils, and the fifth codicil confirmed the will and the four codicils, evidence was admitted to show that the testator intended to confirm the will and the fourth codicil.[7] In cases where the testator has been induced to make his will by fraud, evidence of that fact is admissible.[8]

In construing a will the meaning of any clause is to be collected from the entire instrument and all its parts are to construed with reference to each other, and for this purpose a codicil is to be considered as part of the will. This is the

[1] 4 Ves., 680. See *supra* p 135.

[2] See *Re Gregson's Trusts*, 2 H. and M , 504 ; (S. C.), 10 Jur , N. S , 696. *In the goods of Rosaz*, L. R., 2 P. Div., 66 ; see *supra* p. 135.

[3] *Abbott* v. *Massie*, 3 Ves., 148. See *supra*, p 135.

[4] *In re Bacon's will*, L. R., 31 Ch. D., 460.

[5] See *Bishop of Cloyne* v. *Young*, 2 Ves Sen., 91, 95 ; *Langham* v. *Sandford*, 2 Mer , 6, p. 17 ; *Lynn* v. *Beaver*, T. and R., 68 : Williams on Executors, 6 Edn., p. 1370, 1 Jarm. on Wills, p. 416.

[6] *Lister* v. *Smith*, 2 Sw. and Tr., 282.

[7] *In the goods of Thomson*, L. R., 1 P. and D , 8.

[8] *Doe* v. *Allen*, 8 T. R., 147 ; *Stickland* v. *Aldridge*, 9 Ves., 519.

rule as laid down by Wigram, V.C, in *Ford* v. *Ford*[1] and by section 69 of the Indian Succession Act[2] Thus, where the testator gives to B a specific fund or property at the death of A, and by a subsequent clause gives the whole of his property to A, the effect of the several clauses taken together is to vest the specific fund or property in A for life, and, after his decease, in B, if it appear from the bequest to B that the testator meant to use in a restricted sense the words in which he describes what he gives to A.[3] So, where a testator having an estate, one part of which is called Black Acre, bequeaths the whole of his estate to A, and in another part of his will bequeaths Black Acre to B, the latter bequest is to be read as an exception out of the first, as if he said, "I give Black Acre to B, and all the rest of my estate to A."[4]

If two passages are directly opposed to each other, the latter is to prevail, (*Cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est*-Co. Litt., 1126), but if there is a mere inconsistency, it is the duty of the Court to follow the rule last enunciated and to discover from the whole will the real meaning of the testator, and, if possible, to reconcile all its parts.[5]

There are many cases, as pointed out by KNIGHT BRUCE, L J. upon the construction of wills or other documents, in which the spirit is strong enough to overcome the letter—cases in which it is impossible, for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict or an ordinary interpretation given to particular passages would disappoint and defeat the intention with which the instrument, read as a whole, persuades him that it was framed. A man so convinced, he added, is authorized and bound to construe the writing accordingly.[6]

Another rule is that general words may be understood in a restricted sense, where it may be collected from the will that the testator meant to use them in a restricted sense; and words may be understood in a wider sense than that which they usually bear, where it may be collected from the other words of the will that the testator meant to use them in such wider sense.[7] In other words whether a general intent or a particular intent expressed in a will is to prevail depends on the context of the whole will.[8] Thus, if the testator devise to A "his farm in the occupation of B" and to C "all his marsh

[1] 6 Hare, 492.

[2] Section 69 applies to Hindus, etc., under the Hindu Wills Act

[3] Indian Succession Act, s. 69, illustration, (*a*).

[4] *Ibid*, illustration, (*b*) see *Roe* v. *Nevill*, 11 Q. B., 466.

[5] *Brocklebank* v. *Johnson*, 20 Beav., 213, *per* LORD ROMILLY, M. R See *Egerton* v. *Earl Brownlow*, 4 H. L., 181; *Grey* v. *Pearson*, 6 H. L. Ca., 61.

[6] *Key* v. *Key*, 4 DeG. M. and G., 85.

[7] Indian Succession Act, s. 70, which applies to Hindus, etc., under the Hindu Wills Act.

[8] *Jenkins* v. *Hughes*, 8 H. L. Ca., 571; See *Strong* v. *Teat*, 2 Burr., 912.

lands in L" and part of the farm in the occupation of B consists of marsh lands in L, the testator having also other lands in L, then in that case the general words "all his marsh lands in L" are restricted by the gift to A, and A takes the whole farm in the occupation of B including that portion of the farm which consists of marsh lands in L.[1] So, where a sailor on board ship bequeathed to his mother his gold ring, buttons and chest of clothes, and to his friend A (a shipmate) his red box, clasp knife and all things not bequeathed, a share in a house did not pass.[2]

Questions frequently arise as to whether words, which in themselves are wide enough to pass the residue, are to be cut down when coupled with an enumeration of particular things so as to include only things *ejusdem generis*. Where such words are so used there might be strong reason for extending their operation so as to pass the residue,[3] but if the testator himself goes on to deal with particular parts of his estate, it is clear that the first gift was not intended to be residuary, but is confined to things *ejusdem generis* with the things enumerated. Thus where the testator bequeathed to A "his household furniture and plate, linen, books, China, pictures, *and all other goods of whatever kind*, and, then, after appointing that certain specified moneys should be divided in a particular manner, gave the remainder of such moneys to A, it was held that A was entitled to the general residue.[4] So, in *Rawlings* v. *Jennings*,[5] the words "all my household furniture and effects" were restrained to articles *ejusdem generis*, though the consequence was that the residue was undisposed of. If there is an express residuary gift, words which otherwise would carry the residue must be restrained.[6]

The words "*et cetera*" following an enumeration of specific articles have been held to pass the residue,[7] though in some cases the same words have been confined to things *ejusdem generis*.[8] The words "effects," "goods," "chattels," which in general comprise the whole personal estate of the testator,[9] have also in some cases when standing immediately associated with less comprehensive words, been restrained to articles *ejusdem generis*.[10]

[1] Indian Succession Act, s. 70, illustration, (*a*).

[2] *Ibid*, illustration, (*b*), *Cook* v. *Oakley*, 1 P. Wms., 302.

[3] *Wrench* v. *Jutting*, 3 Beav., p. 523.

[4] *Wrench* v. *Jutting*, 3 Beav., p. 521; Indian Succession Act, s. 70, illustration, (*c*).

[5] 13 Ves., 39.

[6] *Woolcomb* v. *Woolcomb*, 3 P. Wms., 112.

[7] *Chapman* v. *Chapman*, L. R., 4 Ch. Div., 800.

[8] *Newman* v. *Newman*, 26 Beav., 220; *Barnaby* v. *Tassell*, L. R., 11 Eq, 363.

[9] *Ryall* v. *Rolle*, 1 Atk, 180; *Kendall* v. *Kendall*, 4 Russ., Ch. Ca., 360; *Campbell* v. *Prescott*, 15 Ves., 507.

[10] *Hogan* v. *Jackson*, Cowp., 299; *Campbell* v. *Prescott*, 15 Ves, 507; 1 Jarm., p. 751; *Cook* v. *Oakley*, 1 P. Wms., 302.

Numerous examples, however, are to be found of cases in which a wider signification is given to words than that which they usually bear. In some cases words *primâ facie* descriptive of personal estate may, from the context, be held to comprise immoveable property,—*e. g.*, 'all the rest;'[1] 'effects,'[2] 'worldly goods.'[3] So, a devise of rents and profits has been held, in England, to pass the whole interest in land if there are words of inheritance.[4] So, *primâ facie*, a devise of the use of land gives the testator's interest in the land.[5]

It may be of importance, in applying the second part of section 70 of the Indian Succession Act to notice the sense which the following words and phrases have been usually held to bear:—"Household furniture" will pass all personal chattels that may contribute to the convenience of the householder or the ornament of the house,[6] as pictures hung up, and plate, and house linen,[7] but not books,[8] nor wares or other consumable articles,[9] nor goods in the way of trade,[10] nor farming stock,[11] nor tenant's fixtures.[12] 'Goods' will pass all the personal estate of the testator,[13] and 'chattels' or 'effects' will also have the same effect standing alone.[14] So, under 'household goods' everything of a permanent nature,—*i. e.*, articles of household use which are not consumed in their enjoyment, will pass.[15] 'Utensils' will not pass plate or jewels.[16]

'Monies' does not of itself include stock.[17] But the word 'money' may be so used as not only to include stock but other personal property.[18] So 'shares in a railway company' will pass stock in a railway company, unless there is an

[1] *Attree* v. *Attree*, L. R., 11 Eq., 280; *Smyth* v. *Smyth*, L. R., 8 Ch. D., 561.

[2] *Doe* v. *White*, 1 Ea., 33.

[3] *Wright* v. *Shelton*, 18 Jur., 445.

[4] *Johnson* v. *Arnold*, 1 Ves. Sen., 169.

[5] *Cook* v. *Gerrard*, 1 Sann, 183; see *Rabbeth* v. *Squire*, 4 DeG. and J., 406.

[6] *Tempest* v. *Tempest*, 2 K. and J., 635.

[7] *Nicholls* v. *Osborn*, 2 P. Wms., 419.

[8] *Bridyman* v. *Dove*, 3 Atk., 202.

[9] *Porter* v. *Tournay*, 3 Ves., 311.

[10] *Pratt* v. *Jackson*, 2 P. Wms., 302.

[11] *Stone* v. *Parker*, 29 L. J. Ch., 875.

[12] *Finney* v. *Grice*, L. R., 10 Ch. D., 13; see 1 Jarm., p. 757; *Slanning* v. *Style*, 3 P. Wms. 336.

[13] *Ryall* v. *Rolle*, 1 Atk., 180.

[14] *Kendall* v. *Kendall*, 4 Russ. Chan. Ca., 360; *Campbell* v. *Prescott*, 15 Ves., 507.

[15] *Kendall* v. *Kendall*, 4 Russ. Chan. Ca., 369.

[16] *Dame Latimer's case*, 1 Dyer., 59, pl. 15.

[17] *Onnmaney* v. *Butcher*, 1 Turn. and Russ., 271, *per* LORD ELDON; see *Petty* v. *Willson*, L. R., 4 Chan. App., 574.

[18] *Prichard* v. *Prichard*, L. R., 11 Eq., 232; *Cadogan* v. *Palagi*, L. R., 25 Ch. D., 154; *Waite* v. *Combes*, 5 DeG. Sm., 676; see *In re Sutton*, L. R., 28 Ch. D., 464,

ndication to the contrary.[1] And 'securities for money' will pass stock in the funds;[2] but, while it is doubtful whether it will pass bank-stock,[3] it will include money placed at a banker's on deposit notes.[4] In the case of *In re Suton*,[5] the testatrix at the date of the will in August 1881 had over £600 at her bankers, but in February 1883, she invested £600 in the purchase of £586 consols. At the date of her death in May 1884 she had the £586 consols and £555 at her bankers and £8 cash in her house. By her will she desired "that the whole of the money over which I have a disposing power be given to charitable and deserving objects, the amount being £600 Stg." The Court held that the word money ought not to be extended beyond its strict meaning.

Under a bequest of "whatever debts may be due to me at the time of my death," it was held, that a bill of exchange, drawn in the testator's favour, and delivered by him to his banker, and a cash balance in his banker's hands, passed to the legatee.[6]

Where a clause is susceptible of two meanings, according to one of which it has some effect, and according to the other it can have none, the former is to be preferred.[7] LORD TALBOT, in *Atkinson* v. *Hutchinson*,[8] said that where words are capable of a twofold construction, even in the case of a deed and much more of a will, it is just and reasonable that such construction should be received as tends to make it good. The same principle, apparently, has been applied to cases where, upon one construction, a clause in a will seems to offend against the law of perpetuities, but where the clause is fairly capable of another construction, which avoids that objection.[9] In one case the Court adhered to the literal language of the testator, though it was highly probable that he had written a word by mistake for one which would have rendered the devise void.[10]

Mr Jarman,[11] in dealing with this subject, says that no rule of construction is better established or obtains a more unhesitating assent, than that where words are susceptible of several interpretations, we are to adopt

[1] *Morrice* v. *Aylmer*, L. R., 7 H. L., 717

[2] *Bescoby* v. *Pask*, 1 Slm. and Stu., 500.

[3] See *Ogle* v. *Knipe*, L R, 8 Eq, 434.

[4] *Hopkins* v. *Abbott*, L. R., 19 Eq., 222; See Intestate and Testamentary Succession in India, pp. 81—82.

[5] L. R., 28 Ch. Div., 464.

[6] *Carr* v. *Carr*, 1 Mer, 541, note; see Williams on Executors, 1184, 1206.

[7] Indian Succession Act, s. 71; which applies to Hindus, etc., under the Hindu Wills Act.

[8] 3 P. Wms., 259; see *Turner* v. *Frampton*, 2 Coll., 331.

[9] *Martelli* v. *Holloway*, L. R., 5 H. of L., 532

[10] *Chapman* v. *Oliver*, 3 Burr., 1626.

[11] 2 Jar, 141.

that which will give effect to every expression in the context in preference to one that would reduce some of those expressions to silence. Thus, where the testator gives to the next of *his kin* of his name,[1] or to the next of his name and blood,[2] it is clear, that the testator does not use the word 'name' as descriptive of his relations or family only, but means additionally to require, that the devisee or legatee shall bear his name.[3] Section 72 of the Indian Succession Act, which enacts that no part of a will is to be rejected as destitute of meaning, if it is possible to put a reasonable construction upon it, seems to recognise the rule referred to by Mr. Jarman.[4]

In construing a will no word that has a clear and definite operation in the disposal of the testator's property can be struck out.[5] Thus, if there be a devise in fee to A. B. and in a subsequent part of the will a devise to C. D. for life, both parts of the will must stand, and in the construction of law the devise to C. D. shall be first.[6] Where, however, two clauses or gifts in a will are irreconcilable, so that they cannot stand together, the last must prevail.[7] But it is not to be understood from this rule that, because a testator uses in one part of his will words having a clear meaning in law, and in another part words inconsistent with the former, the first words are to be cancelled.[8] It is also a rule of law that a particular intent, although first expressed in a will, must give way to a general intent, the rule being, that technical words and words of a settled legal signification shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise.[9] Yet it was said, that the words "heirs of the body" will yield to a clear particular intent that the estate should be only for life, and that may be from the effect of words superadded or any expression showing the particular intent of the testator; but that must be clearly intelligible and unequivocal.[10]

But while some effect should if possible be given to every word in a will,[11] yet particular words, may in some instances, be rejected, when they are inconsistent with the clearly expressed provisions of the will. Thus, where an *absolute* term of 99 years was limited to *J. C.*, with remainder, after the death of *J. C.*, to the first and other sons in tail-male, the words giving an *absolute* term to *J. C.* were

[1] *Jobson's case*, 2 Cro. Eliz., 567.

[2] *Leigh* v. *Leigh*, 15 Ves., 92.

[3] See *Doe* v. *Gallini*, 4 A. and E., 321.

[4] See *Chambers* v. *Brailsford*, 19 Ves., 654.

[5] *Hall* v. *Warren*, 9 H. of L., 420, *per* LORD CAMPBELL.

[6] *Anon*, Cro. Eliz., 9; see *Doe* v. *Davies*, 4 M. and W, 599; Williams on Executors, 1088.

[7] Indian Succession Act, s. 75; *Constantine* v. *Constantine*, 7 Ves., 100; *Ulrich* v. *Litchfield*, 2 Atk., 372; see *Kerr* v. *Clinton*, L. R., 8 Eq., 463.

[8] *Per* LORD REDESDALE, in *Jeeson* v. *Wright*, 2 Bligh., 56.

[9] *Jeeson* v. *Wright*, *ibid*, 49, 56, 57.

[10] *Ibid*, 53.

Peacock v. *Stockford*, 3 DeG. M. and G., 73.

rejected.[1] So the words, '*for their lives*' were rejected in a devise "to A and his heirs for their lives."[2] So also the word 'aforesaid' has been rejected where the objects to which it was applied had not been mentioned before.[3]

It follows from the rule that the construction of a will is to be collected from the entire instrument and not merely from disjointed parts of it,[4] that if the same words occur in different parts of the same will, they must be taken to have been used everywhere in the same sense, unless there appears an intention to the contrary.[5] And, to prevent the operation of the rule, it has been held, the intention to the contrary must be strongly indicated.[6] The rule, however, does not preclude the Court from putting a different construction on the same words when applied to different subject-matters.[7] And, of course, if words acquire a special meaning by reason of their context, that meaning cannot safely be given them when used in a different context.[8]

In *Sibley* v. *Perry*,[9] the testator made certain bequests to several persons, if living at his decease, and if not, he directed that their lawful *issue* should take the shares which their respective parents, if living, would have taken; and he also made other bequests to the lawful issue, living at certain periods, of other persons. LORD ELDON held that it was clear as to the former class that children were intended, and that this was a ground for giving the word *issue* the same construction in the other bequests. But, where the testator uses an additional word or phrase, in making a bequest to one set of legatees which he has not used with reference to an otherwise similar set of legatees it is to be presumed that by the use of such word or phrase an additional meaning was intended.[10]

It is a rule under the Indian Succession Act that the intention of the testator is not to be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.[11] This is the rule which was laid down by BULLER, J., quoting LORD TALBOT, in *Hopkins* v. *Hopkins*.[12] Accordingly, under

[1] *Coryton* v. *Helyar*, 2 Cox., 340.

[2] *Doe* v *Stenlake*, 12 East, 515.

[3] *Campbell* v. *Bouskell*, 27 Beav., 325. Intestate and Testamentary Succession in India, p. 83.

[4] Indian Succession Act, s. 69; *Ford* v. *Ford*, 6 Hare, 492.

[5] Indian Succession Act, s. 73, which applies to Hindus, etc., under the Hindu Wills Act, See *Rhodes* v. *Rhodes*, 27 Beav., 413.

[6] *Harvey* v. *Harvey*, 32 Beav., 445.

[7] See *Forth* v. *Chapman*, 1 P. Wms., 667; 2 Williams on Executors, 1086.

[8] See *Ballin* v. *Ballin*, 9 C. L. R., 28, (S. C.), I. L. R., 7 Cal., 218, *per* WILSON, J.

[9] 7 Ves., 522.

[10] *Campbell* v. *Campbell*, 4 Bro. C. C., 15; see *Clavering* v. *Ellison*, 3 Drew., p. 472, 7 H. L., 707.

[11] Indian Succession Act, s. 74, which applies to Hindus, etc., under the Hindus Wills Act.

[12] *Thellusson* v. *Woodford*, 4 Ves., 325.

that rule, if a testator in his deathbed bequeaths all his property to C. D. for life and after his decease to a certain hospital, the gift to the hospital being void,[1] the intention of the testator cannot take effect to its full extent, but it takes effect so far as regards the gift to C D.[2] In England, it seems now to be an established rule, that where a fund is bequeathed upon trust, to apply portion for a purpose which is void and the surplus to a charitable purpose, the latter bequest will not fail on account of the invalidity of the other object,[3] even although the amount applicable to the invalid object be not ascertained.[4]

In *Southey* v. *Somerville*,[5] where the testater showed an anxious intention that two parts of his property should go together, it was found that as to one of the two parts the testator had no power of disposition, and it was held, that the devisee should take the other part, notwithstanding that the testator meant him to take it only in conjunction with the other.

Reference has already been made to s. 75 of the Indian Succession Act, which provides where the two clauses or gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.[6] So that if the testator, by the first clause of his will, leaves his estate of Ramnagore 'to A'; and by the last clause of his will, leaves it 'to B and not to A," B will have it.[7] Or, if a man, at the commencement of has will, gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of B, the latter disposition will prevail.[8]

It would seem, however, that, where there is an express gift in a will, and there is subsequent bequest, by implication merely, inconsistent with the first, the prior gift takes effect.[9] Thus, in *Kerr* v. *Clinton*,[10] where a testator having real estate subject to mortgages, for which he was not personally liable, gave his personal estate for payment of his debts and the surplus to his wife absolutely, and in a subsequent devise of his real estate directed that his trustees should raise by sale thereof so much as his personal estate should prove in-

[1] See Indian Succession Act, s. 105.

[2] Indian Succession Act, s. 74, illustration.

[3] *Fisk* v. *Attorney-General*, L. R., 4 Eq., 521; *Hunter* v. *Bullock*, L. R., 14 Eq., 45; *Dawson* v. *Small*, L. R, 18 Eq., 114; *In re Williams*, L. R., 5 Ch. D., 735; *In re Birkett*, L. R., 9 Ch. Div., 576.

[4] *Ibid*

[5] 13 Ves., 486.

[6] Indian Succession Act, s 75, which applies to Hindus, etc., under the Hindu Wills Act, *Ulrich* v. *Litchfield*, 2 Atk, 372; see *Kerr* v. *Clinton*, L. R., 8 Eq., 462; *Constantine* v. *Constantine*, 6 Ves., 100

[7] Indian Succession Act, s 75, illustration (*a*).

[8] *Ibid*, illustration, (*b*)

[9] *Kerr* v. *Clinton*, L. R., 8 Eq., 462.

[10] L. R., 8 Eq., 462.

sufficient for payment of the existing mortgages and charges upon the estate, and subject thereto he devised the estate to his sons, ROMILLY, M. R. held that this was not a revocation of the prior gift, and that the mortgage debts were not payable out of the personal estate.[1]

As we have already seen,[2] all the parts of a will are to be read with reference to each other so as to give effect to every part of the will,[3] and apparent inconsistencies may, in this way, be reconciled. Thus, if an estate in one part of the will is given absolutely to A, and in another part to B, A and B will take jointly,[4] but this only where the gift is of some specific indivisible chattel.[5]

An absolute estate will, in some cases, be reduced to an estate for life to give effect to subsequent gifts.[6]

There is a distinction as pointed out by JAMES, L. J., between a case of two inconsistent gifts, a gift of something in one clause and a different gift of the same thing in another clause, and a case where there is a gift and a direction how the gift is to be paid, which direction is inconsistent with the language of the gift itself. In the former case the rule that the last is to prevail applies. In the latter case the words of the gift must be taken as shewing what the gift is and the direction as to the payment must be struck out as being repugnant to and inconsistent with the gift.[7]

A will or bequest not expressive of any intention is void for uncertainty.[8] Uncertainty either in the subject or object of a bequest is fatal to the bequest.[9] Thus, where the particular *amount* or *part* is left uncertain, as where a handsome gratuity is given to the executors, or the gift is to be according to the wishes of the executors[10] the gift is void.[11] In a case, however, in India[12] it was held by PRINSEP and BEVERLEY, JJ., that a direction to erect a Shiva's temple at a reasonable cost was not void for uncertainty. So, in England, effect has been

[1] See *Bywater* v. *Clarke*, L. R., 18 Ch. D., 17.

[2] *Supra* p. 155.

[3] See s. 69 of the Indian Succession Act, *supra* p.

[4] *Ridout* v. *Pain*, 3 Atk., 486, 493; *Davis* v. *Bennet*, 30 Beav., 226.

[5] *Ulritch* v. *Litchfield*, 2 Atk., 375.

[6] *Sheratt* v. *Bentley*, 2 M. and K., 149; see *Gravenor* v. *Watkins*, L. R., 6 C. P., 500.

[7] *Bywater* v. *Clarke*, L. R., 18 Ch. D., 17.

[8] Indian Succession Act, s. 76. This section applies to Hindus, etc., under the Hindu Wills Act. The illustration to the section is as follows: If a testator says—"I bequeath goods to A;" or "I bequeath to A;" "I leave to A all the goods mentioned in a schedule," and no schedule is found; or "I bequeath 'money,' 'wheat' 'oil,' or the like," without saying how much, this is void.

[9] 1 Jarm., 357.

[10] *Kumar Sami* v. *Subbaryya*, I. L. R., 9 Mad., 325.

[11] *Jubber* v. *Jubber*, 9 Sim., 503.

[12] *Gokoolnath Guha* v. *Issur Lochan Sing*, I. L. R., 4 Cal., 222.

given to a legacy of a reasonable sum for trouble.[1] A bequest in the alternative of £50 or £100 is a good bequest of £100.[2] But a bequest of 'some of my best linen' was held to be void for uncertainty.[3] Where the amount is capable of being ascertained, as when there is a power of appointment or of applying property in a particular way, and there is a gift of so much as is not so appointed or applied, the gift is good.[4] A bequest of '£3,000 or thereabouts' to be raised by accumulating 'annual income' has been held good, the words 'or thereabouts' being considered to meet the difficulty which would arise in accumulating up to the exact amount.[5]

A bequest is not void where the amount is differently stated in different parts of the will, if it appear that one statement was evidently a mistake.[6]

One must be careful not to confound cases where a legatee is allowed to elect between a number of objects of the same kind, or each answering the description, and cases where there is such uncertainty in the object that it is impossible to define what, or how much is intended to be given. The case of *Duckmanton* v. *Duckmanton*,[7] is an example of the former class. There, a testator being seised of two closes in Ridgway Field devised to his son John one close in Ridgway Field and to his son George one close in Ridgway Field, and the Court held that the devise to John was not void for uncertainty, but that he had an election.[8] POLLOCK, C. J., observed, "It was admitted that if he had devised one to John and said nothing as to the other, the devise would have been good. So, if he had devised one to George, it would in like manner have been a good devise. But he devised one to each and it is said that the devise must therefore mean nothing. I cannot understand that." So in *Tapley* v. *Eagleton*,[9] where a testator, who was possessed of three leasehold houses in K Street, bequeathed, "two houses in K Street" in trust for P for life and then to form part of his residuary estate, and the will contained no other reference to the testator's houses in K Street, it was held that two of the houses passed under the gift and that P was entitled to elect which of them he would take.[10]

[1] *Jackson* v. *Hamilton*, 3 J. and Lat., 702; *Edwards* v. *Jones*, 25 Beav., 474; see *Oddie* v. *Brown*, 4 DeG. and J., 179.

[2] *Seale* v. *Seale*, 1 P. W., 290.

[3] *Peck* v. *Halsey*, 2 P. Wm., 387.

[4] *Gude* v. *Worthington*, 3 DeG. and S., 389.

[5] *Oddie* v. *Brown*, 4 DeG. and J., 179.

[6] *Phillips* v. *Chamberlain*, 4 Ves., 51.

[7] 5 H. and N., 219.

[8] *Duckmanton* v. *Duckmanton*, 5 H. and N., 219.

[9] L. R., 12, Ch. D., 683.

[10] See *Jacques* v. *Chambers*, 2 Coll., 435; *Millard* v. *Bailey*, L. R., 1 Eq., 378; *Hobson* v. *Blackburn*, 1 M. and K., 571.

The general rule to be deduced from the cases appears to be that if a testator bequeaths a certain number of articles forming part of a stock of articles of the same description, the legatee will he entitled to select which he will take.

In *Boyce* v. *Boyce*,[1] the testator devised all his houses in S, to trustees in trust for his wife for life, and after her death to convey one of them, whichever shé might think proper, to his daughter M and her heirs, and to convey all the others of them to his daughter C, in fee M died in the lifetime of the testator, and consequently without having chosen any one of the houses. It was held that the gift to C, was only a gift of the houses which should remain, provided that she should choose one of them, and as no choice had been, or indeed could have been made the gift, in favour of C had failed. Somewhat similar reasoning was applied in the case of *Jerningham* v. *Herbert*[2]

Under a gift of such part as a legatee shall choose or select the legatee may make his own selection.[3] Where the gift was of plate to trustees upon trust to permit the widow of the testator "to have and appropriate absolutely to herself such parts thereof, as she should signify in writing her desire to possess" it was held that the widow was entitled to the whole. The ground of the decision was that following the words of the will literally the widow, if put to election, might have taken the whole of the plate with the exception of one article probably of no value, and the maxim "*de minimis*" would apply.[4] In *Kennedy* v. *Kennedy*,[5] on the other hands, it was considered that where a gift was of such part as a legatee might choose, there must be some election and that the legatee could not take the whole. There, the testator gave all his household furniture, linen, wearing apparel, books, plate, wares, fixtures, statues, china, horses, carriages and everything in his house to trustees, of whom his wife was one, and directed all his household property "as aforesaid" should, after his decease, be sold "with the exception of such articles, whatever they may be, that my wife may desire to retain for her own use, which I hereby empower her to appropriate to her own use." The Court considered that the bequest intimated a confidence that the widow would not take the whole, and on that ground held that she must make a selection merely.

Where the bequest is of the residue or surplus of a specified fund remaining after providing for an object which is illegal or unattainable, and the exact amount to be laid out on which is not specified, the bequest is necessarily void for uncertainty, unless the purpose is such and so defined that the Court can determine what would have been the proper amount to be expended, had the

[1] 16 Sim., 476.

[2] 4 Russ, 388.

[3] *Kennedy* v. *Kennedy*, 10 Ha., 438; *Arthur* v. *Mackinnon*, L. R., 11 Ch. D., 385.

[4] *Arthur* v. *Mackinnon*, L. R., 11 Ch. D., 385.

[5] 10 Ha., 438

object been legal or attainable, or, unless (according to some recent cases) the surplus carries with it all that it is not otherwise effectually disposed of.[1] Thus, in *Chapman* v. *Brown*,[2] where there was a trust for building or purchasing a chapel where it might appear to the executors to be most wanted, and if there was any surplus, it was to go to the support of a gospel minister, not exceeding £20 a year, and if there was any further surplus, that was to be applied to such charitable purposes as the executors should think proper, the bequest for the chapel and minister being void, SIR WILLIAM GRANT, M. R., declared the bequest of the further surplus to be void also, since the amount could not be ascertained.[3] If, however, the amount which would have been expended upon the illegal object, had it been legal, can be reasonably ascertained, the Court will determine that amount and so prevent the gift of the residue from being void for uncertain[4] In *Fisk* v. *Attorney-General*,[5] where the testatrix gave £1,000 consols to the rector and church-wardens of a parish and their successors, upon trust to apply such of the dividends thereof as should "from time to time be necessary or required in keeping in repair" her family grave, and to pay and divide "the residue of the dividends" at Christmas every year for ever amongst the aged poor of the parish, WOOD, V. C., held that the rector and church-wardens were entitled to the whole fund. "The gift" he said, "is not to the executors to do certain things and pay the residue to the rector and church-wardens. The gift is out-and-out to the rector and church-wardens and then there is a gift of a portion for a purpose which fails." The case of *Fisk* v. *Attorney-General* was followed in *Dawson* v. *Small*[6] by BACON, V. C. and in *Re Williams*[7] by MALINS, V. C. In *Re Birkett*,[8] where there was a bequest to the incumbent for the time being of *U* of £500, the income to be applied, when necessary, in keeping in repair the grave and the railing and tombstone of A, and the remainder of such income to be applied in providing wine and bread for the sick poor of A, with a gift of the residue to the executor in trust for B, the same question was raised before JESSEL, M. R., who held that, the first purpose of the gift being invalid, the whole of the income was applicable to the charity. He reviewed the previous authorities on the subject. "If there were no authorities" he said, "I should hold, where there is a gift of money upon trust to apply a portion of the income for a definite purpose and then to apply the

[1] 1 Jarm., p. 366.
[2] 6 Ves., 404.
[3] See *Attorney-General* v. *Hinxman*, 2 J. and W., 270
[4] *Mitford* v. *Reynolds*, 1 Phill., 185.
[5] L. R., 4 Eq., 54.
[6] L. R., 18 Eq., 14.
[7] L. R., 5 Ch. D., 735.
[8] L. R., 9 Ch. D., 576.

surplus for another purpose, that, if the first purpose were sufficiently defined to enable you to ascertain the amount of income that would be required for it, and that purpose failed through the gift being invalid, the gift of the surplus would be unaffected beyond the amount so ascertained." It had been suggested by WOOD, V. C., that *Chapman* v. *Brown*,[1] had been overruled by the case of *The Magistrates of Dundee* v. *Morris*,[2] but JESSELL, M. R., expressed an opinion that it was not so.

Uncertainty in regard to the *objects* of a gift arises, as pointed out by Mr. Jarman, either from the testator having described such objects by a term of vague and unascertained signification, or from his having specified a definite class or number of persons, but having shown that all are not to take as the object or objects of his bounty.[3] Thus, a gift to one of a class, as a gift to one of the sons of J. S., who had several sons, is void, although only one may be alive at the death of the testator,[4] and parol evidence is not admissible to show which of the sons was intended.[5] Similarly, it was held that an appointment to one of his sisters, as sole executrix, by the testator who had three sisters at the date of his will, but two died during his lifetime, was void for uncertainty.[6] If there is gift to the whole of a class with the exception of one whose name is omitted, it is considered that there is no uncertainty and that no one has in fact been omitted, and, accordingly, all the members of the class take under the gift.[7] Where there was a bequest in trust for all the testator's "nephews and neices, the sons and daughters of R, including ———————— who ———————— the illegitimate ———————— of the said R, equally," it was held that it was a good bequest to the legitimate sons and daughters of R, to the exclusion of the illegitimate children of R.[8] The view taken of the gift was that the testator had never made made up his mind whether he would insert any names in the blanks or not, and that the effect was much the same as if he had said "including any persons whom I may name hereafter by codicil" and then he had never made a codicil. Where, however, a testator made a gift to "my nephews and neices" and named one nephew and one neice only, and left a long blank after the names, the gift was held to be void for uncertainty, on the ground that the testator had by using the plural number shown an intention

[1] 16 Ves., 404.

[2] 3 Macq., 134.

[3] 1 Jarm., 369-70.

[4] *In the goods of Blackwell*, L. R., 2 P. D., 72.

[5] *Strode* v. *Russel*, 2 Vern., 624.

[6] *In the goods of Blackwell*, L. R., 2 P. D., 72; *In the goods of Baylis*, 2 Sw. and Tr., 613; 13 J. I., (P. M. and A.), 119; *Doe d. Hayter* v. *Jomvills*, 3 East, 72; *Greig* v. *Martin*, 5 Jur. N. S., 329.

[7] *Illingworth* v. *Cooke*, 9 Hare, 37.

[8] *Gill* v. *Bagshaw*, L. R., 2 Eq., 746.

to benefit more than one of each sex of a certain class definitely, but had omitted to give their names, as he had evidently contemplated doing.[1]

A gift to the testator's "aforesaid nephews and neices" where no nephews and neices had been previously named in the will was held not to be void for uncertainty but to include all his nephews and neices.[2] In the case where a blank is left for the name of a legatee the gift is void for uncertainty.[3] It is otherwise where a blank is left for the Christian name or surname only, for in such case parol evidence is admitted to show who was intended.[4] A legacy to a person described by an initial, *e. g.*, as Mrs. C. admits of explanation, as by showing that the testator was accustomed to speak of a particular person by the initial of her name.[5]

Charitable bequests have always received in England a more favourable construction than gifts to individuals, and such bequests will not, in every case, be void by reason of the uncertainty of the object. Thus, where there are two charities of the same name, the legacy will be divided between them.[6] This is an application of what is called the rule of *cy près* which will be dealt with hereafter.

In England, since the Wills Act,[7] everything answering the particular description in the will, to which the testator may happen to be entitled at the time of his death will pass under the will.[8] By the Wills Act, it was enacted that "every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." The terms of s. 77 of the Indian Succession Act are similar in effect. It enacts that "the description, contained in a will, of property the subject of gift, shall, unless a contrary intention appear by the will, be deemed to refer to and comprise the property answering that description at the death of the testator.[9] These sections are intended to give effect to what has been called generic

[1] *Greig* v. *Martin*, 5 Jur. N. S., 329; See *Jerningham* v. *Herbert*, 4 Russ., 388, 390.

[2] *Campbell* v. *Bouskell*, 27 Beav., 325.

[3] *Baylis* v. *Attorney-General*, 2 Atk., 239; *Taylor* v. *Richardson*, 2 Dr., 16; *Hunt* v. *Hort*, 3 Bw. C. C., 311.

[4] *Price* v. *Page*, 4 Ves., 680; *In the goods of De Rosas*, L. R., 2 P. D., 66. See *supra*, pp. 135, 150.

[5] *Abbott* v. *Massie*, 3 Ves., 148; *Clayton* v. *Lord Nugent*, 13 M. and W., 207.

[6] *Waller* v. *Childs*, Amb., 524; *Simon* v. *Barber*, 5 Russ., 112; see *Bradshaw* v. *Thompson*, 2 Y. and C., 295.

[7] 1 Vic., C. 26, s. 24.

[8] *Castle* v. *Fox*, L. R., 11 Eq., 542; *In re Midland Ry. Co.*, 34 Beav., 525.

[9] Section 77 of the Indian Succession Act applies to Hindus, etc., under the Hindu Wills Act.

disposition so as to make the will include all property of the kind described belonging to the testator at the time of his death. Obviously it is not necessary to their application that it should be shown that the testator intended that after-acquired property should pass. If he had no intention on the subject the after-acquired property is made to pass by the force of the statutory provision. In order that after acquired property should not pass the statutes require that the will shall show upon the face of it a contrary intention, that is an intention that after acquired property shall not pass.[1]

A general devise of real estate in England will operate on all property of that description.[2] The qualification "unless a contrary intention appear by the will" does not render it necessary that the contrary intention should be expressed in so many words or in some way quite free from doubt It is sufficient that it is to be gathered by adopting, in reference to the expressions used by the testator, the ordinary rules of construction applicable to wills. Thus, in *Cole* v. *Scott*,[3] where, in a will bearing a particular date, the testator gave "all the estates of which I am *now* possessed," and used the word 'now' in other parts of the will, apparently alluding to the period at which he was making the will, it was held, that the testator had indicated a contrary intention, so as to take the case out of the general rule, and that property acquired after the date of the will was not affected by the will. A similar construction was put on the word 'now' in *Hutchinson* v. *Barrow*.[4] But in *Wagstaff* v. *Wagstaff*,[5] under a gift 'of any other property that I may now possess,' personalty acquired after the date of the will was held to pass. That case seems hardly consistent with the case of *Cole* v. *Scott*; but in *Castle* v *Fox*,[6] MALINS, V. C. expressed his dissent from the decision in *Cole* v. *Scott*. In *Cole* v. *Scott*, however, the words were treated as not strictly speaking generic but merely a description of certain specific property of which the testator was possessed at the date of the will.[7]

Such an expression as "all the lands of which I am seised in A" does not amount, it has been held, to an expression of intention to refer to property in the possession of the testator at the date of his will,[8] but must be read as written just before his death.

The word 'now' has been held, as in *Wagstaff* v. *Wagstaff*, not to show an

[1] See *In re Portal*, L. R., 27 Ch. D., 600; *per* KAY, J.

[2] O'Toole v. Browne, 3 Ell. and B., 572.

[3] 1 Mac. and G., 518.

[4] 6 H. and N., 588.

[5] L. R., 8 Eq., 229.

[6] L. R., 11 Eq., 542; MALINS, V. C.

[7] See *In re Portal*, L. R., 27 Ch. D., 600; *per* KAY, J.

[8] *Doe* v. *Walker*, 12 M. and W., 591; *Langdale* v. *Briggs*, 25 L. J. Ch., 100.

intention that after acquired property should not pass in the following cases: *Dickenson* v. *Dickenson*,[1] *Everett* v. *Everett*,[2] and *In re Midland Ry. Co.*[3] In *In re Portal*,[4] the testator devised to his son G for life "my cottage and land at S," on a certain special condition that the trees should not be cut down, or removed, and that the boundary fences and plantations, etc., should be preserved "in their present state" and after the death of G, to his son with remainders over, and as to all other his freehold estate and the residue of his personal estate, he gave the same to trustees upon certain trusts. After the date of the will the testator contracted to purchase from his son G, a mansion and about 10 acres of land at S, but the contract was not completed. It was held that this property contracted for passed to the son G, under the will, as the testator had not shown with sufficient clearness an intention that after acquired property should not pass under the devise to G. There, although the words "my cottage and my land" were not apt in a devise of a mansion and land, yet the word "land" was held to be large enough to include them, the words "in their present state" being taken to refer to the period of death.

A "gift of the house I now live in" was held to be a gift of specific property and to refer to the house occupied by the testatrix at the date of the will and not at the time of her death.[5]

In *Goodlad* v. *Burnett*,[6] WOOD, V. C., said:—"When I refer to a particular thing, such as a ring, or a horse, and bequeath it as 'my ring' or 'my horse,' it seems to me there might be considerable difficulty in saying that the 'contrary intention' to which the 24th section of the Wills Act refers, does not appear on the face of the will; but when a bequest is of that which is generic—of that which may be increased or diminished, then, I apprehend, the Wills Act requires something more on the face of the will for the purpose of indicating such 'contrary intention' than the mere circumstance that the subject of the bequest is designated by the pronoun 'my.'" In that case it was held, that a bequest of 'my new 3¼ per cent. annuities' comprised all the new 3¼ per cents. which the testatrix had at her death.[7]

In *Re Gibson*,[8] the testator, who was possessed of £1,000 guaranteed stock in the N. B. Railway, bequeathed, 'my one thousand N. B. Railway Preference

[1] L. R., 12 Ch. D., 22.

[2] L. R., 7 Ch. D., 428.

[3] 34 Beav., 525.

[4] L. R., 27 Ch. D., 600.

[5] *Williams* v. *Owen*, 9 L. J. N. S., 200.

[6] 1 K. and J., 348.

[7] See *Douglas* v. *Douglas*, 1 Kay. 400, where the description 'all the stock which I have purchased' was held to have reference to the date of the will, and not to the date of the death of the testator. See *Emuss* v. *Smith*, 2 DeG. and S., 722.

[8] L. R., 2 Eq., 669.

Shares,' and after his will sold his guarantêed stock, and subsequently acquired, by various purchases, other shares and stock in the N. B. Railway, it was held, that nothing passed by the bequest.[1]

In *In re Russell*,[2] the testator, who was at the date of the will entitled to a third share in a partnership business, bequeathed all his share and interest in the partnership, and, the testator having before his death acquired the entire business of the firm, it was held that the will operated upon the whole of the testator's interest in the business at the time of his death.[3]

Section 77 of the Indian Succession Act, like the corresponding section of the English Act, it is to be observed, does not apply to the object of the testator's bounty, but only to the subject. Accordingly, where the testator bequeathed certain funds to A, a widow, for life, or until her marriage, and, after her death or marriage, amongst her children, and A married again between the date of the will and the death of the testator, and he was aware of the marriage,—it was held, that A was not entitled to the income of the fund, but that the gift upon the marriage came at once into operation.[4] The principle, however, which governs the construction of expressions descriptive of a specific *subject*[5] of disposition, applies also to the objects of the gift.[6] Thus, if a testator give an estate or sum of money to his son John, the gift will take effect in favour of his son of this name (if any) at the date of the will, and of him only. If, therefore, such son should die in the testator's lifetime, and the testator should afterwards have another son of the same name, who should survive him, such after-born son would not be an object of the gift.[6] So, a devise or bequest to the wife of A, who has a wife at the date of the will, relates to that person, notwithstanding any change of circumstances which may render the description inapplicable at a subsequent period, and by parity of reasoning, is under *all* circumstances, confined to her; but if A have no wife at the date of the will, the gift embraces the individual sustaining that character at the death of the testator.[7]

The will is held to speak from the death of the testator in reference to gifts to classes, or fluctuating bodies of persons, as, to children or descendants, which applied to the persons answering the description at the death of the testator irrespectively of those to whom the description was appli-

[1] Intestate and Testamentary Succession in India, p. 87.

[2] L. R., 19 Ch. D., 432.

[3] See *Backwell* v. *Child*, Amb., 260.

[4] *Bullock* v. *Bennett*, 7 DeG. M. and G., 283; see the remarks of TURNER, L. J., in *Langdale* v. *Briggs*, 8 DeG. M. and G., 391.

[5] As to specific legacies, see ss. 128—136 of the Indian Succession Act.

[6] 1 Jarm., p. 323.

[7] 1 Jarm., p. 324.

cable at the date of the will, but who subsequently died in the testator's lifetime.[1]

In the absence of a controlling context, a gift to an unmarried woman for life, with remainder to her husband in fee, vests, it has been held, an indefeasible estate of inheritance in the person who first answers the description of her husband.[2]

Under s. 78 of the Indian Succession Act, which, however, does not apply to Hindus, "unless a contrary intention shall appear by the will, a bequest of the estate of the testator shall be construed to include any property which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power; and a bequest of property described in a general manner shall be construed to include any property to which such description may extend, which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power." It follows s. 27 of the English Wills Act. In the English Act the words are "power to appoint in any manner he may think proper" instead of "power to appoint *by will* to any object he may think proper."

The section is confined to general powers. Thus, a power to appoint by will amongst *children* in such manner as the appointor shall think proper, is not within the section.[3] Nor is a power to appoint by will among relations or friends.[4] But a power to appoint by *will* only, which is expressly within the words of the Indian section, was held to be within the words of the English Act,[5] the words "in the manner he may think proper" being taken to refer to the extent of the power in regard to the objects and not to the mode in which it is to be exercised.[6] So a power in a marriage settlement to appoint by deed or will to all and every "person or persons, child or children" is within the section.[7]

A general power given to the survivor of two persons may be exercised by a general devise in a will executed by the ultimate survivor during their joint lives.[8]

The true construction, it was said, of the English Statute,[9] coupling ss. 24

[1] 1 Jarm., 326. See s. 98 of the Indian Succession Act. Intestate and Testamentary Succession in India, p. 86.

[2] *Radford* v. *Wills*, L. R., 7 Chan., 7.

[3] *Cloves* v. *Awdry*, 12 Beav., 604.

[4] *Re Caplin's will*, 2 Dr. and Sm., 527.

[5] *Re Powell's Trusts*, 39 L. J. Ch., 188.

[6] *Hawthorn* v. *Shedden*, 3 Sm. and Gif., 303.

[7] *Cofield* v. *Pollard*, 5 W. R. (Eng.), 774. Shelford's Real Property Statutes, p. 526.

[8] *Thomas* v. *Jones*, 2 Joh. and H., 475; see *Cave* v. *Cave*, 8 De G. M. and G., 131.

[9] 1 Vict., c. 26.

and 27 of the Statute (which correspond with ss. 77 and 78 of the Indian Succession Act) is, that a will may operate as an execution of all powers vested in the testator immediately before his death. A person *sui juris* must be held to intend his will to operate on powers which he had, not at the date of executing it, but which he acquired before his death.[1] Thus, general powers have been held to have been executed by wills dated prior to the creation of the powers.[2] But, although a general residuary bequest would operate as an execution of a power in a subsequent settlement, still the Court has power, where the testator is himself the settlor, in construing both instruments, to consider the surrounding circumstances which might show that the will was not intended as an execution of the power.[3] A general residuary bequest will operate as an appointment,[4] but not where funds have been ineffectually appointed.[5] *In Boyes* v. *Cook*,[6] A, by a separation deed, settled his property, reserving to himself a general power of appointment by will over one-third of it, and declaring trusts as to the remaining two-thirds of it for his wife and children. By his will, executed several months previously to the separation deed, A devised and bequeathed all his property to trustees, upon trust, for his wife and children. It was held (reversing the decision of MALINS, V. C.), that the will was a good execution of the power, and that the settlement, and the circumstances, under which it was executed, could not be looked at to show a contrary intention.[7]

A bequest of general pecuniary legacies is a bequest of property described in a general manner, and operates as an execution of a power.[8] In *Re Davies' Trust*,[9] WICKENS, V. C., said:—"Where a testator, with a general power of appointment, gives legacies and appoints an executor, he must be taken as exercising his general power to the extent to which the fund subject to it is required to make the legacies effective; and even where a testator, having such a power, makes a will directing the payment of his debts without more, and appointing an executor, the appointed fund is liable for the payment of

[1] *Thomas* v. *Jones*, 2 Joh., and H., 482, *Per* PAGE WOOD, V. C.

[2] *Stillman* v. *Weedon*, 16 Sim., 26; *Patch* v. *Shore*, 2 Dr. and Sm., 589.

[3] L. R., 14 Eq., 267.

[4] *Spooner's Trusts*, 2 Sim., N. S., 129; *Attorney-General* v. *Brackenbury*, 1 H. and C., 782; see *Bush* v. *Cowan*, 32 Beav., 228.

[5] *Wilkinson* v. *Schneider*, L. R., 9 Eq., 423; *Chandler* v. *Pocock*, L. R., 16 Chan. Div. (C. A.), 648. Intestate and Testamentary Succession in India, pp. 88 and 89.

[6] L. R., 14 Chan. Div. (C. A.), 52.

[7] In that case *In re Ruding's Settlement*, L. R., 14 Eq., 266, was questioned. See *In re Clark's Estate*, L. R., 14 Chan. Div, (C. A.), 422; *In re Hernando*, L. R., 27 Ch. D., 284.

[8] *In re Wilkinson*, L. R., 4 Chan., 587; see *Hurlstone* v. *Ashton*, 11 Jur., N. S., 725; see also *Re Davies's Trusts*, L. R., 13 Eq., 166.

[9] L. R., 13 Eq., 166.

his debts, if his own estate is insufficient. The same rule would, I conceive, apply in both these cases, though no executor were appointed."

It has not been decided whether an appointment of an executor without more would make the fund assets.[1]

Before the Wills Act it was necessary to show the intention to exercise the power. Under that and the Indian Succession Act it is necessary, it will be observed, to show a contrary intention in order to exclude the execution of the power.[2] In *Scriven* v. *Sandom*,[3] PAGE WOOD, V. C., said :—"There is no contrary intention within the meaning of the Statute,[4] unless you find something in the will inconsistent with a view that the general devise was meant as an execution of the power."[5] "This," he went on to say, "is the only safe rule for discriminating between mere conjecture and the contrary intent required by the Statute."[6] In ascertaining whether a testator has shown a contrary intention not to execute a general power by a residuary gift, it makes no difference whether the settlement creating the power was made by the testator himself or by a stranger.[7]

An appointment expressed to be made in exercise of every power enabling the appointor, does not extend to property which the appointor cannot appoint without the exercise of a power of revocation, if there be other property to which the appointment can apply.[8]

In England, where a power of appointment was given by will, and no provision was made in default of appointment the rule, as laid down in *Brown* v. *Higgs*,[9] was that, if the power was one which it was the duty of the party to execute, made his duty by the requisition in the will and put upon him as such by the testator, who had given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power and not as having a discretion whether he should exercise it or not, and the Court will adopt the principle as to trusts and will not permit his negligence, accident or other circumstances to disappoint the interests of those for whose benefit he was called upon to execute it. Adopting that principle the Indian Legislature has enacted, that where property is bequeathed to, or for the benefit of, such of certain objects

[1] *Ibid.*

[2] See *Lake* v. *Currie*, 2 DeG. M. and G., 536, 548.

[3] 2 Joh. and H., 743.

[4] S. 27 of the Wills Act.

[5] 2 Joh. and H., p. 744.

[6] See *Pettinger* v. *Ambler*, L. R , 1 Eq , 510.

[7] *In re Clark's Estate*, L. R., 14 Eq., (C. A.), 422.

[8] *Pomfret* v. *Perring*, 5 DeG. M. and G., 775; Intestate and Testamentary Succession in India, pp. 89, 90.

[9] 4 Ves., 708; 5 Ves., 495; and 8 Ves., 561.

as a specified person shall appoint, or for the benefit of certain objects in such proportions as a specified person shall appoint, and the will does not provide for the event of no appointment being made, if the power given by the will be not exercised, the property belongs to all the objects of the power in equal shares;[1] but this provision does not apply to Hindus or other persons to whom the Indian Succession Act is not applicable. Accordingly, under that Act, if A, by his will, bequeaths a fund to his wife for her life, and directs that, at her death, it shall be divided among his children in such proportions as she shall appoint, and the widow dies without having made any appointment, the fund shall be divided equally among the children.[2] In the case of *Brown* v. *Higgs*,[3] there was a bequest "to such children of my nephew S, as my nephew J shall think most deserving, and that will make the best use of it; or to the children of my nephew W, if any such there are, or shall be." J died in the lifetime of the testator, and it was held, that all the children were entitled under the implied trust.[4]

Where, however, there is a gift over, in default of appointment, to the objects of the power or to other persons, of course, the words of the power cannot operate to vest any estate in the objects of it by implication, if there is no appointment.[5]

The Indian Succession Act appears to deal only with the case of a "power given by the will not being exercised," but it is submitted that it would equally apply to the case of a power being exercised, but improperly exercised. In England, it has been held, that where a power is improperly exercised, what is ill-appointed goes as in default of appointment.[6] It seems that the donee of a power may execute it without referring to it or taking the slightest notice of it, provided that the intention to execute it appear.[7]

It is well settled, that a gift under a power, embracing objects not within the line of perpetuities, is wholly void, and that the fund cannot be given to those to whom it might have been legally appointed.[8]

Section 77 of the Indian Succession Act, as already pointed out, does not in terms apply to the objects of the testator's bounty. As to the time

[1] Indian Succession Act, s. 79. This section does not apply to Hindus, etc., under the Hindu Wills Act.

[2] *Ibid.* illustration; *Grieveson* v. *Kirsopp*, 2 Keen., 653.

[3] 4 Ves., 708; 5 Ves., 495; and 8 Ves., 561.

[4] See also *Borrough* v. *Phillcox*, 5 My. and Cr., 72.

[5] 1 Jarman, 552; *Smith* v. *Death*, 5 Madd., 371, see *per* CROMPTON J., in *Roddy* v. *Fitzgerald*, 6 H. of L. Ca., 856.

[6] *Routledge* v. *Dorril*, 2 Ves., 357; see *Fehrsen* v. *Simpson*, I. L. R., 4 Calc., 514.

[7] Sugden on Powers, p. 289 (8th edn.)

[8] *Ibid*, p. 505; see *Jee* v. *Audley*, 1 Cox, 324.

when the class to take in default is to be ascertained, the general principle seems to be this: If the instrument itself gives the property to a class, but gives a power to A to appoint in what shares and in what manner the members of that class shall take, the property vests until the power is exercised in all members of the class, and they will all take in default of appointment; but if the instrument does not contain a gift of the property to any class, but only a a power to A to give it, as he may think fit, among the members of that class, those only can take who might have taken under an exercise of the power. In that case, the Court implies an intention to give the property in default of appointment to those only to whom the donee of the power might have given it.[1] In *Lambert* v. *Thwaites*,[2] certain property was settled on A and B for their joint lives, and on the death of the survivor, amongst all and every the children of A, in such shares as he might by will appoint. There were seven children living at the date of the settlement, one of whom died before A, who died without executing the appointment. It was held, that the representatives of the deceased child were entitled to a share.[3] Similarly, where there is a direct gift to the younger children of the wife of C, as she should appoint, it is a present legacy to the children living at the death of the testator subject to variation by the appointer. The gift cannot be extended to the children, by a future husband, born subsequently.[4] If the gift be not a direct gift, but in remainder, as to A for life with remainder to the children of A as he shall appoint, it goes to all the children born in the testator's lifetime and coming into being before A's death.[5] In the case of an implied gift created by means of a power, as where property is given to A for life and after his death to such children, or other class of persons, as he shall appoint, and there is no gift over in default of appointment, the same rule is followed in default of appointment.[6] Thus, where the gift of a fund is to A for life with power to A to dispose of the capital among the children of the testator as he might appoint by will, in default of appointment, all the children take equally.[7]

In *Longman* v. *Brown*,[8] there was a bequest to executors in trust that they should pay unto and amongst the testator's two brothers and his sister, or their

[1] *Per* KINDERSLEY, V. C., in *Lambert* v. *Thwaites*, L. R., 2 Eq. 155; see the cases there cited.

[2] L. R., 2 Eq., 158.

[3] Intestate and Testamentary Succession in India, pp. 90, 91.

[4] *Coleman* v. *Seymour*, 1 Ves. Son., 209.

[5] *Crone* v. *Odell*, 1 Ball and Bea., 449; *Lambert* v. *Thwaites*, L. R., 2 Eq., 155; Theobald on Wills, p. 235.

[6] *Brown* v. *Higgs*, 4 Ves., 708; *Burrough* v. *Phillcox*, 5 My. and Cr., 73.

[7] *Grieveson* v. *Kersopp*, 2 Keen., 653.

[8] 7 Ves., 124.

children, in such shares and at such times as the trustees shall think proper, and, in default of appointment, the children living at the death of the testator, to the exclusion of those born afterwards, were held to be entitled with their parents, *per capita.*

In the case of a gift by implication arising from a power, the gift applies only to such persons as are objects of the power, and accordingly, where the power is to be exercised by will and no appointment is made, the gift takes effect in favour of those who are alive at the death of the donee of the power—or in other words only those of the class can take who could have taken under the appointment. Thus, where there was a gift of a residue to the wife of the testator for life with power to appoint the same to her children, it was held, that, as the gift was only through the power, so that the class took only by implication, only those who survived the donee of the power could take in default of appointment.[1] But, if instead of an implied gift arising from a power there is a direct gift by deed or will, the gift will not be confined to the objects living at the decease of the donee of the power.[2]

Where the words of a will clearly point to a personal enjoyment by the objects of the power at the death of the tenant for life, there is good ground for holding that none of those who predeceased the tenant for life should share in default of appointment.[3] In *White's Trusts*,[4] there was a bequest to trustees for A for life, and if he should die childless, upon trust to apply the sum for the benefit of the testator's children or their issue as the trustees should think fit, and there was no gift in default of appointment. No appointment was made, and the tenant-for-life survived the donees of the power and died childless, and it was held, that the period for ascertaining the class was the death of the tenant-for-life, and that the sum should accordingly be divided among such of the children and grandchildren as were living at that time.

Where a testator gave £3,000 to his executors upon trusts for the benefit of M during her life, and from, and immediately after her death, "in trust for the benefit of her children to do that which they, my executors, may think most to their advantage," and the executors died in the lifetime of M, it was held, that the children of M who were living at her death were entitled to the fund in equal shares.[4]

In England, in wills prior to 1838, a devise of lands to a person without

[1] *Walsh* v. *Wallinger*, 2 R. and M., 78.

[2] *Casterton* v. *Sutherland*, 9 Ves., 445; *Falkner* v. *Wynford*, 9 Jur., 1006.

[3] *Per* WOOD, V. C., *Re White's Trusts*, 1 John., 660.

[4] 1 John., 656.

[5] *In re Phene's Trusts*, L. R., 5Eq., 346; see *Wilson* v. *Duguid*, L. R., 24 Ch. D., 244; where the power was contained in a deed of settlement.

any words of limitation confers an estate for life only.[1] This technical rule having been found generally subversive of the actual intention of testators, it was enacted by s. 28 of the Wills Act, 1 Vict., c. 26, that "where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will." The Courts, however, had always leaned towards enlarging indefinite devises in wills prior to, or not subject to, that Act[2] and laid hold of any indication of any intention that more than an estate for life was meant to pass.

Section 82 of the Indian Succession Act follows 28 of the Wills Act in case of bequests without words of limitation It enacts that, "where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him."

Where a testator gave to his neice the house she lived in, and grass for a cow in Gillfield, it was held, that she took an estate in fee-simple in the house.[3] It was been held that s 28 of the Wills Act only applies to estates vested in, or in the power of the testator, and not to estates or interests created *de novo* by the will.[4] In case of *Nicholls* v. *Hawkes*[5] the testator devised his real estates to a devisee in fee, with certain annuities or annual rent-charges to two annuitants, and it was held, that the annuitants took the annuities for life. If the testator had had merely the rent-charge in fee, a devise of it, without words of limitation, would have passed the testator's entire interest.

The presumption in England is that an annuity given simply is for life only. "All the subsequent cases," it was said by WOOD, V. C., "down to *Kerr* v. *Middlesex Hospital*,[6] confirm the principle that a gift *simpliciter* is only an annuity for life." The principle enunciated by the VICE-CHANCELLOR WOOD is followed in the Indian Succession Act, which directs that where, an annuity is created by will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the will, and that whether the annuity be directed to be paid out of the property generally or that a sum of money is bequeathed to be invested in the purchase of it.[7] In accordance with the

[1] *Hawk*, 130.

[2] *Bolton* v. *Bolton*, L. R., 5 Exch., 145; *Pickwell* v. *Spicer*, L. R., 7 Exch. (Exch. Ch.), 105, and *Re Harrison's Estate*, L. R., 5 Chan., 408.

[3] *Reay* v. *Rawlinson*, 29 Beav., 88.

[4] *Nicholls* v. *Hawkes*, 22 L. J., Chan., 255; (S. C.) 10 Hare, 342.

[5] 22 L. I. Ch. 255; (S. C.) 10 Hare, 342.

[6] 22 L. I. Ch. 355.

[7] Indian Succession Act, s. 160. This section applies to Hindus, etc., under the Hindu Wills Act.

cases decided in England, a different principle has been applied by the Indian Succession Act to bequests of the interest or produce of a fund. Under s. 159 of that Act, where the interest or produce of a fund is bequeathed to any person, and the will affords no indication that the enjoyment of the bequest should be of limited duration, the principal as well as the interest belongs to the legatee. The devise, therefore, of the income or of the rents and profits of land will pass the fee.[1] Before the Wills Act such a devise without words of limitation would have passed an estate for life only. If the gift be to trustees in trust for others the *cestuis que trustent* take the whole estate and interest of the testator in the subject of the gift.[2]

An intention that a restricted interest is to pass under a bequest without words of limitation, it has been held, is not shown merely because another devise in the same will contains words of limitation.[3] In *Gravenor* v. *Watkins*,[4] a contrary intention was gathered from the will from the fact that an estate to one devisee could not come into existence unless another estate were construed to be a life-estate.[5]

According to the general Hindu Law, if an estate be given to a man simply without express words of inheritance, or if there be added to such a gift an imperfect description of it as a gift of inheritance, it will pass the entire estate of the testator,[6] but, as pointed out by Sir ROBERT COLLIER, in *Mahomed Shumsool* v. *Shewkram*,[7] in construing the will of a Hindu, the Court may take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property, and it may be assumed that as a general rule, women do not take absolute estates of inheritance, and that being so, it will require some indication in case of bequests to women of an intention to pass an absolute estate. In *Koonjbehari Dhur* v. *Prem Chand Dutt*,[8] it was said to be a well-established rule that a Hindu wife takes by the will of her husband, no more absolute right over the property bequeathed than she would take over such property if conferred upon her by gift during the lifetime of her husband, and that whether in respect of a gift or a will, it would be necessary for the husband to give her in express terms a heritable right or power of alienation. That, however, is in respect of immoveable property, for under a gift of moveables she would take an absolute estate. The general Hindu Law has apparently been modified by the Hindu Wills Act, for Section 82 of the Indian Succession Act

[1] *Mapnoa* v. *Greener*, L. R., 14 Eq., 456.
[2] *Moore* v. *Cleghorn*, 10 Beav., 423.
[3] *Wisden* v. *Wisden*, 2 Sm. and Giff., 396.
[4] L. R., 6, C. P., 500.
[5] See *Brook* v. *Brook*, 3 Sm. and Giff., 280.
[6] *Tagore* v. *Tagore*, B. L. R., p. 395; *per* WILLES, J.
[7] L. R., 2 I. A., 7, p. 14. See *supra*, pp. 18, 59.
[8] I. L. R., 5 Cal., 684, (S. C.), 5 C. L. R., 561.

has been embodied in the Hindu Wills Act. Under that section it must appear by the will that only a restricted interest is to pass.

The Legislature, in some respects following the decisions of the Courts in England, has in sections 80, 81, 84, 86 and 87 of the Indian Succession Act laid down certain rules for the construction of gifts made to objects under particular designations descriptive of relationship or of membership of a class. It is, however, to be borne in mind that these sections of the Indian Succession Act have not been embodied in the Hindu Wills Act, and that they apply only to the wills of such persons as are governed by the former Act.

From the extent of the words "relations," "near relations" and other words descriptive of relationship, it had been found necessary by the Courts in England to narrow their signification, when applied to objects of the testator's bounty, by a construction confining them in each case to the next of kin under the Statute of Distributions, by which in England the succession in case of intestacy is regulated.[1] In India, the Legislature has specially determined how bequests in favour of persons or classes of persons described merely in terms descriptive of indefinite relationship are to be construed in respect of the distribution of the property bequeathed. Thus, under s. 80 of the Indian Succession Act where a bequest is made to the 'heirs,' or 'right heirs,' or 'relations,' or 'nearest relations,' or 'family,' or 'kindred,' or 'nearest of kin,' or 'next-of-kin,' of a particular person, without any qualifying terms, and the class so designated forms the direct and independent object of the bequest, the property bequeathed is to be distributed as if it had belonged to such person, and he had died intestate in respect of it, leaving assets for the payment of his debts independently of such property. The following cases are given as illustrative of the section: (*a.*) A leaves his property "to his own nearest relations." The property goes to those who would be entitled to it if A had died intestate, leaving assets for the payment of his debts independently of such property. (*b.*) A bequeaths 10,000 rupees "to B for his life, and after the death of B, to his own right heirs." The legacy after B's death belongs to those who would be entitled to it if it had formed part of A's unbequeathed property. (*c.*) A leaves his property to B, but if B dies before him, to B's next-of-kin: B dies before A; the property devolves as if it had belonged to B and he had died intestate, leaving assets for the payment of his debts independently of such property. (*d.*) A leaves 10,000 rupees "to B for his life, and after his decease, to the heirs of C." The legacy goes as if it had belonged to C, and he had died intestate, leaving assets for the payment of his debts, independently of the legacy.

Again in the case of bequests to representatives of a particular person, the Indian Succession Act provides that, where a bequest is made to the 'representatives,' or 'legal representatives,' or 'personal representatives,' or 'executors or administrators' of a particular person, and the class so designated forms the

[1] *Walter* v. *Maunde*, 19 Ves., 424.

direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person, and he had died intestate in respect of it."[1] Thus, if a bequest is made to the "legal representatives of A," and A has died intestate and insolvent, B, his administrator, is entitled to receive the legacy, and must apply it in the first place to the discharge of such part of A's debts as may remain unpaid, and if there be any surplus, B must pay it to those persons who at A's death would have been entitled to receive any property of A's which might remain after payment of his debts, or to the representatives of such persons.[2]

The terms of these sections of the Indian Act, however, are not exhaustive, and the following cases decided by the English Courts may be usefully referred to, as guides of construction in cases not provided for by the sections.

In *Gower* v. *Mainwaring*,[3] the words 'friends *and* relations' were held by LORD HARDWICKE, to mean 'relations,' the word 'friends' being taken as synonymous with relations; and in *In re Caplin's Will*[4] the words 'friends or relations' received the same construction.

A devise to the testator's 'nearest relation' (in the singular) was held to be to the nearest relation at the time, or where there were more persons than one in the same degree, to all such persons in equal shares,[5] the word 'relation' in the singular number being treated as a *nomen collectivum* in the same sense as 'kindred.'[6] In the case of *Pyot* v. *Pyot* the bequest was to "the nearest relation of the name of P.," and it was held there, that the name P. stood merely for the *stock*, and that a woman otherwise entitled did not lose her right by a change of name on marriage.[7]

A gift to be divided among persons related to the testator is the same as a gift to relations.[8] And a gift to deserving or *poor* relations will, in general, receive the same construction as a gift to relations.[9]

'Relations by blood or marriage' was held to include those who are married to persons entitled under the Statute of Distributions,[10] but relations by marriage are not included in a bequest to relations generally.[11]

[1] S. 81. This section is not applicable to Hindus, etc.

[2] *Ibid*, illustration.

[3] 2 Ves. Sr., 87.

[4] 2 Dr. and Sm., 527; (S. C.) 34 L. J., Chan., 575.

[5] *Marsh* v. *Marsh*, 1 Bro. C. C., 293.

[6] *Pyot* v. *Pyot*, 1 Ves. Sr., 335, *per* LORD HARDWICKE.

[7] 1 Ves. s. 2, 335, see *Leigh* v. *Leigh*, 15 Ves., 92.

[8] *Rayner* v. *Mowbray*, 3 Bro. C. C., 234.

[9] *Widmore* v. *Woodroffe*, Amb., 636.

[10] *Devisme* v. *Mellish*, 5 Ves., 529.

[11] *Davies* v. *Baily*, 1 Ves., Sr., 84; *Harvey* v. *Harvey*, 5 Beav., 134; see *Frogley* v. *Phillips*, 30 Beav., 168; affirmed, 7 Jur. (N. S.), 349; *Hibbert* v. *Hibbert*, L. R., 15 Eq, 372.

In England, the word 'family' was construed, in *Cruwys* v. *Colman*,[1] to be equivalent to kindred or relations; also in *White* v. *Briggs*,[2] and *Grant* v. *Lynam*.[3] In subsequent cases, however, it has been held, that the primary meaning of the word 'family' is 'children,' and that there must be some circumstances arising either in the will itself, or the situation of the parties, to prevent that construction.[4] These later cases, however, would not apply in the Indian Courts, inasmuch as s. 80 of the Indian Statute expressly treats 'family' as equivalent to 'relations.'

A testamentary gift by a married man to his 'family,' it was held by the Court of Chancery, should be read as a gift to his children, to the exclusion of his wife.[5]

A gift to 'next-of-kin' or 'nearest of kin' under the Indian Succession Act is the same as a gift to relations. It is otherwise in England, where a gift or limitation to next-of-kin *simpliciter*, is construed to mean the nearest of kin or nearest blood-relations of the testator, irrespective of the Statute of Distributions.[6] Husband and wife are not of kin to each other, but under any of the limitations provided for by section 80 of the Indian Succession Act they would be entitled to take. In England, 'relation' does not include 'wife.'[7]

It is to be observed that the bequests referred to in section 80 of the Indian Succession Act are only to have the effect provided for where there are *no qualifying terms*. The limitations are in themselves vague and flexible, and may be narrowed or enlarged by the context: thus, 'family' may in some instances mean 'children,'[8] or 'heirs,'[9] or relations by marriage.[10] *Primâ facie* "the meaning of "next-of-kin" is next-of-kin at the death of the person whose next-of-kin is spoken of,"[11] and this construction will prevail, although, following a life-estate, there is a gift to a class, and if none, *then* to the persons who would *then* be entitled to administer.[12] But it is otherwise when the context requires that the word 'then' should be referred to the death of tenants-for-life.[13]

[1] 9 Ves., 319.

[2] 2 Ph., 583.

[3] 4 Russ., 292.

[4] *In re Terry's Will*, 19 Beav. 580; see the remarks of JAMES, V. C., in *Snow* v. *Teed*, L. R., 9 Eq., 624; *Burt* v. *Hellyar*, L. R., 14 Eq., 160.

[5] *In re Hutchinson*, L. R., 8 Chan. Div., 540.

[6] *Elmsley* v. *Young*, 2 M. and K., 780; *Withy* v. *Mangles*, 10 C. and F., 215; *Halton* v. *Foster*, L. R., 3 Chan., 505.

[7] *Green* v. *Howard*, 1 Bro. C. C., 31.

[8] *Barnes* v. *Patch*, 8 Ves., 604.

[9] *Wright* v. *Atkyns*, 17 Ves., 255.

[10] *MacLeroth* v. *Bacon*, 5 Ves., 159.

[11] *Per* LORD CRANWORTH, *Guindry* v. *Penniger*, 1 D. M. and G., 506.

[12] *Cable* v. *Cable*, 16 Beav., 507; *Bullock* v. *Downes*, 9 H. of L. Ca., 1.

[13] *Wharton* v. *Barker*, 4 K. and J., 483.

In England, under a power to appoint to such of the '*family*' or 'relations' of a person as he shall think fit, the appointee is not restricted to the next-of-kin under the Statute of Distributions. But, if the power is not exercised, they alone will take.[1] So a power to appoint to 'the family or next-of-kin' is not restricted to the nearest of kin or statutory next-of-kin.[2] The same construction with reference to the rules of distribution in case of intestacy, it is submitted, would apply under this Act in case of similar powers, when no appointment is made. The bequest will be given *per capita* and not *per stirpes*.[3] The case of *Pope* v. *Witcombe*,[4] is, as reported, *contra*, but no such point was decided.[5] The rule as to distribution in case of intestacy, in the construction of bequests of the nature described in section 80 of the Indian Succession Act has been made use of, not for the purpose of regulating the distribution, but for the purpose of ascertaining the objects.

In the case of bequests to the "representatives" or the "executors" or "administrators" of a particular person, it is clear that, under s. 81 of the Indian Succession Act, they do not take the gift beneficially, but hold it as part of the estate which they represent,[6] and the same rule obtains in England.[7] A gift, however, to "persons hereinafter appointed executors" in equal shares is a gift to them as individuals and beneficially.[8]

An ultimate limitation to the next personal representative was held to mean the *nearest* of kin.[9]

[1] *Harding* v. *Glyn*, 1 Atk., 469; 5 Ves., 501; *Re Caplin's Will*, 2 Dr. and Sm., 527; (S. C.) 34 L. J., Chan., 578.

[2] *Snow* v. *Teed*, L R., 9 Eq, 622.

[3] Indian Succession Act, s. 80; *Attorney-General* v. *Doyley*, 7 Ves., 58*n*; *Harding* v. *Glyn*, 1 Atk, 460

[4] 3 Mer., 689.

[5] Sugden on Powers, 660.

[6] See illustration to the section.

[7] *Re Henderson*, 28 Beav, 656; *Stocks* v. *Dodsley*, 1 Ke., 325; *Long* v. *Watkinson*, 17 Beav., 471.

[8] *Re Henshaw*, 10 Jur., N S, 837; see *Harrison* v. *Harrison*, *ib.*, 611; where executors were held to take beneficially, there being no disposition of the residue.

[9] *Stockdale* v. *Nicholson*, L R, 4 Eq, 359; compare *Re Gryll's Trust*, L. R., 6 Eq., 589, where the term "personal representatives" was held to mean statutory next of kin.

LECTURE VII.

INDIAN SUCCESSION ACT—CONSTRUCTION OF WILLS,—(*continued*).

Alternative bequests—Bequests to "children" "issue," etc.—Relationship imports legitimacy—Presumption of legitimacy—Bequests to future illegitimate children—Reputation of legitimacy—Construction of "children," "grandchildren," "nephews," "cousins" etc.—Rules as to half-blood—Cumulative bequests—Substitutional bequests—Rule against double bequests—Residuary bequests—Lapse in case of contingent bequests—Survivorship—Prevention of lapse in case of bequests to children, etc.—Lapse where lapsed share goes undisposed of—Gifts to class under general description—Survivorship in case of gifts to described class—Bequests to a person by particular description not in existence at testator's death—Bequest to a person not in existence at testator's death subject to prior bequest—Rule against perpetuities in India—in England—Principle in deciding questions of remoteness—Bequests to idols under Hindu Law—Bequest to class in respect to some of whom it is inoperative—*Leake* v. *Robinson*—Rules as to remoteness in England—Effect of gifts over before time of vesting—Gifts vested subject to being divested—Bequests to take effect in failure of prior bequests—Effect of directions as to accumulation—Accumulations under Hindu Law—Bequests to religious and charitable uses—Doctrine of *cy près*—Superstitious uses.

In England, under a gift to a person or class of persons, *or* to another person or class of persons, 'or' was formerly read '*and*,' the legatees taking equally.[1] The principle, however, of these cases has not been followed, and now, in such cases, '*or*' is considered in general as substitutional, as, in a gift to A *or* his issue or children, A will be entitled, if living at the death of the testator or period of distribution; if not, his issue or children will be entitled.[2] So, under a gift to the children *or* grandchildren of A, if all the children of A are living, they alone will be entitled.[3] In case of the original gift being to a class living at the testator's death, with a substitutional gift confined to the children of the persons comprised in the class, the substitution will have no effect in regard to those who never became members of the class.[4] Again, where the gift is to a class *or* their issue, and the gift is clearly substitutional, the issue of members of the class who were dead at the date of the will, will not take.[5]

Section 83 of the Indian Succession Act, which deals with alternative or substitutional bequests, appears to contemplate a gift being made in the first instance to a person and not to a class of persons. It may be that the draftsman's inten-

[1] *Eccard* v. *Brooke*, 2 Cox., 213; *Horridge* v. *Fergusson*, Jac., 583.

[2] *Montague* v. *Nucella*, 1 Russ., 165; *Gittings* v. *MacDermot*, 2 M. and K., 69; *Whitcher* v. *Penley*, 9 Beav., 477; *Blundell* v. *Chapman*, 10 Jur., N. S., 332.

[3] *Margitson* v. *Hall*, 10 Jur., N. S., 89.

[4] *Shergold* v. *Bone*, 13 Ves, 370; *Smith* v. *Farr*, 3 Y. and C., Exch., 328.

[5] *Congreve* v. *Palmer*, 16 Beav, 435.

tion was to assimilate the English law. The illustrations of which there are seven, do not give a single example of a gift in the first instance to a class. The section itself is as follows: "Where property is bequeathed to a *person* (not *or class of persons*) with a bequest in the alternative to *another person*, if a contrary intention does not appear by the will, the legatee first named shall be entitled to the legacy, if he be alive at the time when it takes effect: but if he be then dead, the person *or class of persons* (*sic.*) named in the second branch of the alternative shall take the legacy."[1] Thus, if a bequest is made to A or to B, if A survives, B takes nothing,[2] but if A is dead at the date of the will,[3] or dies after the date of the will and before the testator,[4] the legacy goes to B. So, if the bequest is to A or his heirs, or to A or his nearest-of-kin, A takes the property absolutely, if he survives the testator,[5] but if he dies in the lifetime of the testator, the bequest to his heirs or his nearest-of-kin, takes effect. Again, where the bequest is to A for life, and after his death to B or his heirs, if A and B survive the testator and A survive B,[6] or if B dies in the testator's lifetime but A survives the testator,[7] upon A's death the bequest to the heirs of B takes effect. If, however, it appears from the will that the original and substituted legatees are to take co-ordinately, '*or*' will be read '*and*' as where the gift was to such of the testator's daughters *or* daughters' children as should be living at her son's death "without considering any superiority or eldership whatever."[8] Similarly, where such appeared from the will to be the intention of the testator, a gift to children living at the period of distribution *or their legal representatives* was construed a gift to children then living and the issue of those then dead.[9]

By the English law, the general rule is that where personal property is given in terms that would carry the fee-simple in land, the gift is absolute.[10] Thus, a bequest to 'A and his legal representatives,'[11] to 'A and his heirs or

[1] Indian Succession Act, s. 83. The section applies not to Hindus, etc., under the Hindu Wills Act.

[2] *Ibid*, illustration, (*a*).

[3] Illustration (*b*), see *Montague* v. *Nucella*, 1 Russ, 165; *Atwood* v. *Alford*, L. R., 2 Eq, 479.

[4] *Ibid.*

[5] *Ibid*, illustrations, (*d*) and (*e*).

[6] *Ibid*, illustration, (*f*). See *Girdlestone* v. *Doe*, 2 Sim., 225; *Porter's Trust*, 4 K and J., 188; *Habergham* v. *Ridehalgh*, L. R., 9 Eq., 395.

[7] *Ibid.* Illustration, (*g*), *Smith* v. *Smith*, 8 Sim., 353; *Re Hotchkiss's Trusts*, L. R., 8 Eq., 643; *Habergham* v. *Ridehalgh*, L. R, 9 Eq., 395.

[8] *Richardson* v. *Sprang*, 1 P. Wms., 433.

[9] *King* v. *Cleveland*, 4 DeG. and J., 477; *Re Philp's Will*, L. R., 7 Eq., 151; *Burt* v. *Hellyar*, L. R., 14 Eq., 160; see *Wingfield* v. *Wingfield*, L. R., 9 Chan. Div., 658.

[10] *Appleton* v. *Rowley*, L. R., 8 Eq., 139.

[11] *Taylor* v. *Beverley*, 1 Coll, 108.

representatives,'[1] gives the absolute interest, the additional words being merely words of limitation, and not of purchase. So a bequest to A and the heirs of of his body will pass an absolute estate.[2] Again, if there be a gift to A for life, and then to his executors, or administrators, or to his personal representative,[3] or to A for life, and after his decease to the heirs male of his body, A takes an absolute estate.[4]

By English law, however, where there is a bequest to 'A and his children *simpliciter*, and there are no children living at the date of the will, but there are at the testator's death, A and such children will take jointly.[5] If there are no children then living, A takes absolutely, though he may afterwards have children.[6] But it seems, that a slight variation is sufficient to change the construction and give a life-estate to the parent with remainder to his children,[7] whether born in the testator's lifetime or after his decease.[8] In England, where real estate is devised to a man and his children, he having none at the time, the word 'children' is taken as a word of limitation. But if the parent has children at the time of the devise, then, *primâ facie*, he and his children take jointly.

The rule under the Indian Succession Act is as follows: "Where property is bequeathed to a person, and words are added which describe a class of person, but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will."[9]

A bequest to A and his brothers is a bequest to a class, of whom A is himself one, and is not within the meaning of the rule, and A and his brothers will be entitled to the legacy. The following bequests: "to A and his children," "to A and his children by his present wife" "to A and the heirs of his body," "to A and his issue," "to A and his descendants," and similar bequests pass to A in each case, the whole interest which the testator had in the subject of the legacy.[10] But where the bequest is to A for life and after his death to his issue, the issue of A are the direct objects of a distinct and independent gift and all

[1] *Appleton* v. *Rowley*, L. R, 8 Eq., 139; *Lugar* v. *Harman*, 1 Cox, 250.

[2] *Seale* v. *Seale*, 1 P. W., 290.

[3] *Avern* v. *Lloyd*, L. R., 5 Eq, 383; *Alger* v. *Parrot*, L. R., 3 Eq., 328.

[4] *Bulton* v. *Twining* 3 Mer., 179.

[5] *Buffar* v. *Bradford*, 2 Atk., 220; *De Witte* v. *De Witte*, 11 Sim., 41; *Mason* v. *Clarke*, 17 Beav., 126; *Wild's case*, 6 Rep, 16b., 17b; *Campbell* v. *Boushell*, 27 Beav., 325, *Byng* v. *Byng*, 10 H. L. Ca., 171.

[6] *Scott* v. *Scott*, 15 Sim, 47; *Wild's case, supra.*

[7] *Ward* v. *Grey*, 26 Beav., 485.

[8] *Vaughan* v. *Marq. of Headford*, 10 Sim., 639, 642; *Jeffrey* v. *De Vitre*, 24 Beav., 296.

[9] Indian Succession Act, s. 84. See the illustrations. This section does not apply to Hindus etc.

[10] *Ibid.*, illustration, (*a*).

persons who at A's death answer the description will take the property in equal shares.

In England, it has long been an established rule that a gift to children, sons, daughters or issue imports, *primâ facie*, legitimate children or issue,[1] and this rule it was said will not yield to mere conjecture or to anything short of the clearest evidence of an opposite intention, which intention[2] may be shewn in the will, either by express designation or by necessary implication.[3] So in India under the Indian Succession Act in the absence of any intimation to the contrary, in the will, the term 'child,' 'son,' or 'daughter,' or any word which expresses relationship, is to be understood as denoting only a legitimate relative, or where there is no such legitimate relative, a person who has acquired, at the date of the will, the reputation of being such relative.[4]

It is to be observed that in case of illegitimate children, the reputation of being the children of a particular person must, under section 87 of the Indian Succession Act have been acquired at *the date of the will.* Accordingly, the cases in England of bequests to future illegitimate children born between the date of the will and the testator's death, being held good as to children who have acquired the reputation of being the children in question, do not apply.[5] According to illustration (g.) to s. 87 of the Indian Succession Act, a bequest

[1] 2 Jarm., 217.

[2] Hill v. Crook, 6 H. L., 276; *per* LORD CHELMSFORD.

[3] *Ibid.*

[4] Indian Succession Act, s. 87.—This section does not apply to Hindus etc. The latter part of the section is not quite clear, as the last words 'such relative' would, on a strict grammatical construction, appear to mean 'such legitimate relative.' If this be the proper construction, it would follow that where there were no legitimate relatives of the description in the will, the illegitimate 'child,' 'son,' daughter,' &c., must, in order to take under the will, have acquired the reputation of being the legitimate 'child,' 'son,' or 'daughter' &c., at the date of the will. That such was the construction intended by the Legislature seems to be indicated by the marginal note to the section, that "words expressing relationship denote only legitimate relatives, or failing such, relatives *reputed legitimate.*" This construction, however, is not borne out by the illustrations to the section, which follow the rule of English law, that where there are no legitimate relatives, the persons, who being illegitimate have acquired at the date of the will the reputation, not necessarily of legitimacy, but of being the 'child,' 'son,' or 'daughter,' &c. (as the case may be) of the particular person, will take under the description of 'child,' 'son, or 'daughter, &c., ; see illustrations (*d*), (*e*), and (*f*), where the illegitimate children of *B* are declared to take under the description of 'children of B,' where they are reputed to be the *children* (not legitimate children) of B.—*Wilkinson* v. *Adam*, 1 V. and B., p. 452; *Earle* v. *Wilson*, 17 Ves., 528.

[5] See *Occleston* v. *Fullalove*, L. R., 9 Chan., 147; *In re Goodwin's Trusts*, L. R., 17 Ed., 345; *In re Bolton* L. R., 31 Ch. D. 542; *In re Hastie's Trusts* L. R., 35 Ch. D., 728; see also the judgment of LORD SELBORNE and the *dicta* of LORDS CHELMSFORD and COLONSAY in *Hill* v. *Crook*, L. R., 6 H. of L., 278.

in favour of the child to be born of a woman, who never becomes the wife of the testator is void, for in such a case the child to be born could not, of course, at the date of the will have acquired the reputation of being the child of the testator.

In *Occleston* v. *Fullalove*[1] the testator had gone through a ceremony of marriage with M. L. his deceased wife's sister, who had two daughters, C. and E. by him, and who was *enciente* with a third at the date of the will. By his will he gave a moiety of his property to trustees in trust for M. L., for life, and after her death for his reputed children C. and E. and all other children which he might have or be reputed to have by M. L., then born or thereafter to be born. The third child was born before the death of the testator and was acknowledged by him to be his child. It was held, although LORD SELBORNE dissented, that the after-born child was entitled to share with her sisters under the will. "I am of opinion" said James, L. J. "on the whole case that the testators' intention is clear; that there is no principle of public policy to prevent that intention being effected and that there is no authority to prevent my giving a decision in accordance with what I feel to be the truth, the honesty, the moralty, the justice of the case in favour of the appellant's (the third daughter's) right to share with her sisters in the bequest." In *In re Hasties' Trusts*[2] where the testators gave a fund in trust for my four natural children by M. E. M., *viz.*, J., C., E., and J. H. and all and every other children and child which may be born of the said M. E. M. previous to, and of which she may be pregnant at, the time of my death, share and share alike, it was held that upon the construction of the will the word children must be taken to include illegitimate children, that the bequest was not void for uncertainty and that being a gift by will to illegitimate children of the testator to be in *esse* before the death of the testator it was a good gift within the rule laid down in *Occleston* v. *Fullalove*, and that the children who came into *esse* after the date of the will and before the death of the testator were entitled to share in the gift.

In England, prior to the decision of *Occleston* v. *Fullalove*,[3] it was held, that a gift to prospective illegitimate children was void as being against public policy,[4] and apparently that case leaves untouched the rule that there cannot be a valid gift to future illegitimate children described only by reference to paternity.[5] In India, where there is a bequest to the children of B, who had illegitimate children, but never had up to the date of the will any legitimate children, but who after that date and before the death of the testator had other illegitimate children born,

[1] L. R., 9 Ch. 147.

[2] L. R., 35 Ch. D., 728.

[3] L. R., 9 Chan., 147.

[4] *Medworth* v. *Pope*, 27 Beav., 71; *Pratt* v. *Matthew*, 22 Beav., 328.

[5] See *In re Bolton*, L. R., 31 Ch. D., 542, p. 552.

who acquired the reputation of being B's children, only the children born at the date of will are objects of the bequest.[1] A child *en ventre sa mère* may acquire the reputation of being the child of a particular person by a woman to whom the reputed father is not married and such a child may take,[2] but although a bequest, without reference to the parent, to the child of which a certain woman is *enciente* is good, it would seem that a gift to a child of which a woman is *enciente* by a *particular person* is void for uncertainty, *e. g.*, a bequest to such child as A (not the wife of the testator) may happen to be *enciente* by me.[3]

Extrinsic evidence can be received, in case of bequests to the children of a particular person, where there are no legitimate children, for the purpose of showing that certain persons had acquired the reputation of being the children of the person named in the will[4] and that the testator had knowledge of the fact of the reputation.[5] If illegitimate children are identified by name,[6] or other sufficient description, they will be entitled to take.[7] Thus, where there is a bequest to the children of A *now living*, and A has only illegitimate children,[8] or to the children of a deceased person who had only illegitimate children,[9] or to the *children* (pl.) of a deceased person who had but *one* legitimate child and an illegitimate child,[10] the illegitimate children will take under the will. In *Savage* v. *Roberston*[11] the gift was to the testator's sister, by her maiden name, and her children, who were illegitimate, and the children were held to be entitled. In *Wilkinson* v. *Adam*,[12] the testator, who was a married man, but had illegitimate children by A, after making specific devises to his wife, and also to A, devised the whole of his estate in trust for the children he might have by the said A, and the illegitimate children at the date of the will were held to be entitled.[13]

The intention to include illegitimate children need not be expressed in language which is necessarily susceptible of only one interpretation, but it is sufficient if it is indicated in a way that excludes the probability of an opposite in-

[1] Indian Succession Act, s. 87, illustration (*e*).

[2] *Ibid*, illustration (*b*).

[3] *Earle* v. *Wilson*, 17 Ves., 528.

[4] *Wilkinson* v. *Adam*, 1 V. and B., 422; *Swaine* v. *Kennerley*, *ib.*, 469.

[5] *Re Herbert's Trust*, 1 John and H., 121; *Tytler* v. *Dalrymple*, 2 Mer., 419.

[6] See *Clifton* v. *Goodbun*, L. R., 6 Eq., 278; *Meredith* v. *Farr*, 2 Y. and C, 525.

[7] *Metham* v. *D. of Devon*, 1 P. Wms, 529.

[8] *Dover* v. *Alexander*, 2 Hare, 252; *per* WIGRAM, V. C.

[9] *Tytler* v. *Dalrymple*, 2 Mer., 419; *Edmunds* v. *Fessey*, 29 Beav., 223; Indian Succession Act, s. 87, Illustration (*d*).

[10] *Gill* v. *Shelley*, 2 Russ. and My., 336; *Leigh* v. *Byron*, 1 Sm. and Giff., 486.

[11] L. R., 7 Eq., 176; see *Laker* v. *Hordern*, L. R., 1 Chan. Div, 664.

[12] 1 V. and B., 422.

[13] See also *Lepine* v. *Bean.*, L. R., 10 Eq., 160. Intestate and Testamentary Succession in India, p. 106.

tention having existed in the mind of the testator.[1] In *Hill* v. *Crook* the testator's daughter had gone through the marriage ceremony with A, her deceased sister's husband, and the gift was to my "daughter B, the wife of A," and then for "the children of my said daughter B." B had children before the date of the will, and they were held to be entitled under the description in the will. There, there could be no possibility of A and B having legitimate children between them, as the marriage was invalid. The same rule, apparently, would not apply if A and B, though unmarried at the date of the will, might have married and had legitimate children.[2] Again, illegitimate children will take with legitimate under a bequest to the children legitimate or illegitimate of A; the latter class, however, being confined to those born at the date of the will.[3] If it is once ascertained that illegitimate children are to take with legitimate children, a reference to the 'said children' will comprise both classes.[4] Thus, also, a natural daughter, included by description in a prior class of daughters, was held entitled to take with legitimate daughters under a subsequent general gift to 'my daughters.'[5]

A bequest by an unmarried man or woman to his or her children can only take effect (if at all) in favour of illegitimate children, since, under s. 56 of the Indian Succession Act,[6] a will not made in exercise of a power of appointment is revoked by the testator's marriage. This case is analogous to the cases where there is no possibility of legitimate children to satisfy the terms of bequest.[7]

Where the testator had three illegitimate children and one legitimate child, a bequest to all and every, his child and children, at his death, was held not to include the illegitimate children, though there was a direction to pay each child one-fourth part of the income of his property.[8] So, in *Dorin* v. *Dorin*,[9] the testator, who had two illegitimate children by a certain woman, married her, and the day after his marriage made a will, in which, after leaving her his real and personal property for life, he said,—"I leave her at liberty to direct the disposal of the property amongst *our* children by will at her death in such manner as she shall think fit, and should she make no will I desire that the property shall be divided equally *among children by her*." He had no child born

[1] *Per* LORD CHELMSFORD, in *Hill* v. *Crook*, L. R., 6 H. of L., 277.

[2] See *In re Ayle' Trust*, L. R., 1 Chan. Div., 282.

[3] *Barnett* v. *Tugwell*, 31 Beav., 232; 8 Jur., N. S., 787. See *In re Haseldine*, L. R., 31 Ch. D., 511. Intestate and Testamentary Succession in India, p. 106.

[4] *Owen* v. *Bryant*, 2 DeG. M. and G., 697; see, however, *Bagley* v. *Mollard*, 1 R. and M., 581.

[5] *Wurts* v. *Cubbit*, 19 Beav., 421; *Tugwell* v. *Scott*, 24 Beav., 141.

[6] See s. 18 of the Wills Act, 1 Vict., c. 26. It is otherwise in case of persons to whom the Hindu Wills Act is applicable.

[7] See *Pratt* v. *Matthew*, 22 Beav., 328.

[8] *Cartwright* v. *Vawdry*, 5 Ves., 530; *Re Wells*, L. R., 6 Eq., 599.

[9] L. R., 7 H. of L., 568.

after the date of the will, but he lived for some time after making it, and always treated the two illegitimate children as his own children. The Court held, that subject to the life-interest of the wife, the real and personal property of the testator was undisposed of, on the ground that there was nothing on the face of the will to show that illegitimate children were intended to take. The testator might have had legitimate children.[1] So, where there is a bequest to the children of a person who has illegitimate children at the time of the will, the fact that that person is not likely from old age or any other cause to have other children, is of course not sufficient to entitle the illegitimate children to take under a bequest to their mother and her children.[2]

In the case of *Barlow* v. *Orde*,[3] in which the Court had to consider the meaning of the word 'children' in the will of a Col. Skinner, whose origin was unknown, and who died in 1841, leaving illegitimate children whom he had so recognized, the Privy Council held that English law did not apply to him, and that from the text and surrounding circumstances the word 'children' might be interpreted as referring to illegitimate children. The case of *Barlow* v. *Orde* was a case to which the Succession Act did not apply, and the will was construed according to the principles of justice, equity and good conscience.[4]

If the testator having enumerated his children and named one of them who is illegitimate leaves a legacy to his "said children," there is a sufficient indication in the will of an intention that the illegitimate child should take with the legitimate children.[5] But, even where the bequest is to 'all the children of A,' and there are both legitimate and illegitimate children, the latter are excluded, and no extrinsic evidence is admissible to show the intention of the testator.[6] In *Laker* v. *Hordern*,[7] the testator gave all his property to his daughters, and there were illegitimate, but no legitimate, daughters and BACON, V. C. held, that the illegitimate daughters took under the bequest; but the case was dissented from by MALLINS, V. C., in *Ellis* v. *Houston*,[8] on the ground, following *Dorin* v. *Dorin*,[9]

[1] Intestate and Testamentary Succession in India, p. 107.

[2] *Paul* v. *Children*, L. R., 12 Eq., 16; *In re Overhill's Trust*, 1 Sm. and Giff., 362, *per* STUART, V. C.

[3] 5 B. L. R., (P. C.), 1.

[4] Intestate and Testamentary Succession in India, p. 105. As to cases in which Courts are to be guided, in construing wills, by the rules of justice, equity and good conscience, see *Broughton* v. *Pogose*, 12 B. L. R. (F. B.) 74; *Abraham* v. *Abraham*, 9 M. I. A. 195: *Greenway* v. *Hogg*, Bourke's Rep. Pt. VII, p. 133, Reg. III of 1793, s. 21; Reg. II of 1802 (Mad.) s. 17.

[5] Indian Succession Act, s. 87, illustration (*c*).

[6] *Ellis* v. *Houston*, L. R., 10 Chan. Div., 236, *Cartwright* v. *Vawdry*, 5 Ves., 530.

[7] L. R., 1 Chan. Div., 644.

[8] L. R., 10 Ch. D., 236.

[9] L. R., 7 H. L., 568.

that as the testator was married, there was a possibility of his having legitimate daughters, who would take.[1]

Where a testator made a special and distinct provision for J. M., the illegitimate child of his daughter A. J., the Court of Appeal held, that this was inconsistent with an intention to include J. M. in a subsequent general gift to A. J.'s children.[2] In *In re Humphries*[3] the testatrix bequeathed to "A, the eldest daughter of my deceased daughter, S, my gold watch" and she bequeathed other property "in trust for such of the children of my deceased daughter S, who shall attain twenty-one, absolutely share and share alike, the shares of such of them as shall be daughters to be for their sole and separate use." S had two legitimate children and she had also one illegitimate daughter who was the person spoken of as "A, the eldest daughter" of S. The Court held that there was sufficient indication of an intention that A should be included in the description of "the children of S."

Section 86 of the Indian Succession Act lays down the following apparently hard-and-fast rules of construction. The word 'children' in a will applies only to lineal descendants in the first degree; the word 'grandchildren' applies only to lineal descendants in the second degree of the person whose 'children' or 'grandchildren' are spoken of;[4] the words 'nephews' and 'neices' apply only to the children of brothers or sisters; the words 'cousins' or 'first cousins,' or 'cousins-german' apply only to children of brothers or of sisters of the father or mother of the person whose 'cousins,' or 'first cousins,' or 'cousins-german' are spoken of; the words 'first cousins once removed' apply only to children of cousins-german, or to cousins-german of a parent of the person whose 'first cousins once removed' are spoken of; the words 'second cousins' apply only to grandchildren of brothers or of sisters of the grandfather or grandmother of the person whose 'second cousins' are spoken of; the words 'issue' and 'descendants' apply to all lineal descendants whatever of the person whose 'issue' or 'descendants' are spoken of.[5] Words expressive of collateral relationship apply alike to relatives of full and of half-blood. All words expressive of relationship apply to a child in the womb who is afterwards born alive.[6]

These rules in the main are in accordance with the rules of construction applied by the Court in England in respect of the same terms. The corresponding rules in England, however, seem more elastic, and have in some cases been modi-

[1] Intestate and Testamentary Succession in India, p. 105.

[2] *Megson* v. *Hindle*, L. R., 15 Chan. Div., See *Bagley* v. *Mollard*, 1 Russ. and My., 581—586; *Wilkinson* v. *Adam*, 1 V. and B., 422—468; *In re Humphries*, L. R., 24 Ch. D., 691.

[3] L. R., 24 Ch. D., 691.

[4] *Oxford, (Earl of)* v. *Churchill*, 3 V. and B., 59.

[5] *Leigh* v. *Norbury*, 13 Ves., 340.

[6] Section 86 of the Indian Succession Act does not apply to Hindus.

fied according to circumstances indicating an extended or restricted meaning as the case may be. For instance, though in England, nephews and neices mean *primâ facie* the children of brothers and sisters including those of the half-blood,[1] yet, if the testator at the date of his will and death had no nephews and neices of his own, nephews and neices of his wife will take, even though the testator had brothers and sisters living at the date of his will.[2] In *Reeves* v. *Brymer*[3] there is a dictum of LORD ALVANLEY that children may mean grandchildren, where there can be no other construction, and in *Crooke* v. *Brookeing*[4] the Lords Commissioners, while they held that grandchildren could not take under a gift to children, went to say that if there were no child, grandchildren might have taken. In *Berry* v. *Berry*[5] there was a gift to the children of the testator's deceased brother, and in another clause of the will there was a gift to the issue of the same brother. The brother had only one son, who died in the testator's lifetime leaving four children. Following the dicta referred to, and apparently relying upon the grandchildren, as issue of the brother, being objects of the testator's bounty, it was held that the grandchildren took the gift to the children of the brother.[6] In a very recent case, in which these cases just quoted were considered, under a gift to children, where there were no children living at the date of the will, grandchildren were allowed to take.[7] The principle upon which the English Courts act appears to be this—that if the testator gives a legacy to the children of a deceased person mentioning that person to be dead, and at the date of the will there were no children of that person, but their grandchildren, then the Court, on the principle *ut res magis valeat*, holds that the gift takes effect in favour of the grandchildren.[8]

In England, the word "issue" has been restricted to mean children and not other lineal descendants where it appeared that the testator intended so to use it, as where the word was coupled with the word parent,[9] but the words "issue lawfully begotten" will not limit a bequest to the children.[10] Those who take under a bequest to issue or descendants of a particular person take *per capita*.[11]

[1] *Grieves* v. *Rawley*, 10 Hare, 63.

[2] *Sheratt* v. *Mountfield*, L. R., 8 Ch., 928; *Hogg* v. *Cook*, 32 Beav., 641. See *In re Taylor*, L. R., 34 Ch. D., 225; see *supra*, pp. 144, 149.

[3] 4 Ves., 698.

[4] 2 Vern., p. 106; *Hussy* v. *Dillon*, Amb., 603; *Wytte* v. *Blackman*, 1 Ves., 196.

[5] 3 Giff., 134.

[6] See *Fenn* v. *Death*, 23 Beav., 73.

[7] *In re Smith*, L. R., 35 Ch. D., 559.

[8] *Ibid*, *per* KAY, J.; see *Radcliffe* v. *Buckley*, 10 Ves., 195.

[9] *Sibley* v. *Perry*, 7 Ves., 522; *Martin* v. *Holgate*, L. R., 1 H. L., 175; *Hensman* v. *Pearse*, R., 7 Ch., 276; 2 Jarm., 106.

[10] *Evans* v. *Jones*, 2 Coll., 516.

[11] *Crossly* v. *Clare*, Amb., 397; *Butler* v. *Stratton*, 3 Bro. C. C., 367.

A gift to offspring has been held to be a gift to children to the exclusion of grandchildren.[1] In *In re Blower's Trust*,[2] STUART, V. C., allowed great-nephews and neices to be included in a gift to nephews and neices, but on appeal, the Court confined the words nephews and neices to their primary signification.[3]

Under English law, "cousins" and "cousins-german" are held to mean, *primâ facie*, first cousins and do not include the descendants of first cousins.[4] So, it has been held, that "second cousins" will not include children or grandchildren of first cousins[5] or first cousins once removed[6] but in another case, where there were no second cousins either at the date of the will or at the date of the testator's death, first cousins once removed were held entitled under a gift to "my second cousins.[7]

According to the rule as to *half-blood*, which is the same in India as in England, gifts to *brothers and sisters* generally will include half-brothers and sisters, and their children will take under gifts to nephews and neices.[8] There must, however, be a blood-relationship, so that widows or widowers of deceased brothers or sisters will not be entitled under such gifts.[9]

As we have seen, "children" or "issue" may be used as words of limitation merely, as where there is a gift to "A and his children" or "to A and his issue.[10]

There is nothing in the rule in the Succession Act now under discussion which would prevent a gift to "children" *simpliciter* including children by any marriage.[11]

Where a legatee is given by a will, or by a will and the codicils to such will, more than one legacy, the question arises whether they are to be treated as cumulative or substitutional. If the will affords no indication, as to whether the second bequest was intended to be in stead of, or in addition to, the first, and the question is raised, the following rules of construction, which closely follow

[1] *Lister* v. *Tidd*, 29 Beav., 618; *Thompson* v. *Beasley*, 3 Drew., 7.

[2] L. R., 11 Eq., 97.

[3] *Ibid*, 6 Ch., 351.

[4] *Stoddart* v. *Nelson*, 6 DeG. M. and G., 68; *Sanderson* v. *Bayley*, 4 M. and C., 56.

[5] *In re Parker*, L. R., 17 Ch. D., 262.

[6] *Bridgnorth (Corporation of)* v. *Collins*, 15 Jim., 541.

[7] *In re Bonner*, L. R., 19 Ch. D., 201; *Slade* v. *Fooks*, 9 Sim., 386.

[8] *Grieves* v. *Rawley*, 10 Ha., 63, 66.

[9] *Hussey* v. *Berkley*, 2 Ed., 194.

[10] Indian Succession Act, s. 84. *Byng* v. *Byng*, 10 H. L. C., 171; *Slater* v. *Dangerfield*, 15 M. and W., 263.

[11] *Critchell* v. *Taynton*, 1 R. and My., 541; *Stavers* v. *Barnard*, 2 Y. and C., 539; see *Isaac* v. *Hughes*, L. R., 9 Eq., 191.

the English law,[1] apply[2] under the Indian Succession Act: *First.*—If the same specific thing is bequeathed twice to the same legatee in the same will, or in the will and again in a codicil, he is entitled to receive that specific thing only.[3] Thus, if A having ten shares, and no more, in the Bank of Bengal, make his will, containing near its commencement, the words "I bequeath my ten shares in the Bank of Bengal to B," and after other bequests, the will concludes with the words "and I bequeath my ten shares in the Bank of Bengal to B." B is entitled simply to receive A's ten shares in the Bank of Bengal; or if, having one diamond ring, which was given him by B, A bequeathed to C the diamond ring which was given him by B, and afterwards by a codicil to his will, he, after giving other legacies, bequeathed to C the diamond ring which was given him by B, C can claim nothing except the diamond ring which was given to A by B.[4] *Second.*—Where one and the same will, or one and the same codicil, purports to make in two places a bequest to the same person of the same quantity or amount of anything, he is entitled to one such legacy only.[6] *Third.*—Where two legacies of unequal amount are given to the same person in the same will, or in the same codicil, the legatee is entitled to both.[7] *Fourth.*—Where two legacies, whether equal or unequal in amount are given to the same legatee, one by a will and the other by a codicil, or each by a different codicil, the legatee is entitled to both legacies.[8]

The first rule it will be observed applies only in case of specific bequests, *i. e.*, bequests of specified property distinguished from all other property of the testator.[5]

The rule against double gifts being cumulative does not apply to cases where a residue or a share of a residue is given to a person to whom a specific or pecuniary gift has been made.[9] The intention of the testator, as has been already indicated, where it can be collected from the will, or the will and codicils, must over-ride the rules stated above.[10] Even where there is but one

[1] See notes to *Hooley* v. *Hatton*, 2 Wh. and Tud., L. C., 321.

[2] Indian Succession Act, s. 88. This section applies to Hindus etc. under the Hindu Wills Act.

[3] See *Duke of St. Albans* v. *Beauclerk*, 2 Atk., 638; *Suisse* v. *Lowther*, 2 Hare, 432.

[4] Indian Succession Act, s. 88, illustrations (*a*), (*b*).

[5] *Holford* v. *Wood*, 4 Ves., 76; *Garth* v. *Meyrick*, 1 Bro., C. C., 30; *Manning* v. *Thesiger*, 3 M. and K., 29; *Early* v. *Middleton*, 14 Beav., 453.

[6] *Curry* v. *Pile*, 2 Bro. C. C., 225.

[7] *Hooley* v. *Hatton*, 1 Bro. C. C., 389*n.*; *Cresswell* v. *Cresswell*, L. R., 6 Eq., 69; *Wilson* v. *O'Leary*, L. R., 12 Eq., 525; L. R., 7 Chan., 448.

[8] For definition of specific legacies, see Indian Succession Act, s. 129.

[9] *Kirkpatrick* v. *Bedford*, L. R., 4 Ap. Ca., 96; *Ledger* v. *Hooker*, 18 Jur., 481.

[10] *Yockney* v. *Hansard*, 3 Hare, 620.

testamentary paper, legacies of the same amount will be cumulative if the testator connects a different motive in regard to each legacy, for by so doing he intimates an intention that the legatee should take the second legacy in addition to the other.[1] So, where the gift was to trustees, and the legacies which were of equal amount and given by the same will, were introduced by the words 'upon trust to pay,' and 'upon further trust to pay,' the legatee was held entitled to both.[2] On the other hand, where legacies of equal amount are given by different instruments they may be construed to be substitutional if expressed to be given from the same motives.[3] Generally, it may be said, a difference in the way in which two gifts are given is in favour of their being cumulative.[4] Thus, where A by his will bequeaths to B the sum of Rs. 5,000 and also bequeaths to him the sum of Rs. 5,000, if he shall attain the age of 18, B is entitled absolutely to one sum of Rs. 5,000 and takes a contingent interest in another sum of Rs. 5,000.[5]

In *Russell* v. *Dickson*[6] the testator gave by his will "to my natural or reputed daughter M. S. £2000 for her own sole or separate use, the interest thereof at 5 per cent. to be expended on her education," and entrusted the care and charge of her to his brother. In a codicil executed five years afterwards he said "I add £3000 to the £2000 to which M. S. is entitled under my will by which she becomes entitled to £5000." About a year afterwards and about ten days before his death he made a further codicil in which he said "not having time to alter my will, and to guard against any risk, I hereby charge the whole of my estate and property in the funds with the sum of £20,000 for my daughter M. D." in this instance giving her his own name as if she was a legitimate daughter. The circumstances were held to be sufficient to rebut the presumption in favour of the last legacy being treated as an additional legacy.

In England, legacies given by different instruments have been held to be substitutional and not cumulative where there was ground for treating the second instrument as intended to be in substitution of the former,[7] as where the second instrument was described as the last will and testament.[8] The contents of the

[1] Indian Succession Act, s. 88, illustration, (*g*).

[2] *Barkenshaw* v. *Hodge*, 22 W. R., (Eng.) 484, cited in Theobald on Wills, p. 108.

[3] *Benyon* v. *Benyon*, 17 Ves., 34; *Hurst* v. *Beach*, 5 Madd., 358; see *Wilson* v. *O'Leary*, L. R., 7 Ch., 448.

[4] *Masters* v. *Masters*, 1 P. W., 523; *Hodges* v. *Peacock*, 3 Ves., 735; Indian Succession Act, s. 88, illustrations (*g*), (*h*) and (*i*).

[5] Indian Succession Act, s. 88, illustration (*i*).

[6] 4 H. L. Ca., 293.

[7] *Duke of St. Albans* v. *Beauclerk*, 2 Atk. 636.

[8] *Hemming* v. *Clutterbrick*, 1 Bli., N. S., 479, 2 S. and S., 311; see *Wilson* v. *O'Leary* L. R., 7 Ch., 448, p. 455; *Tuckey* v. *Henderson*, 33 Beav., 174.

instruments may rebut the *primâ facie* intention and show that cumulation was not intended, but mere repetition, as in *Whyte* v. *Whyte*,[1] where the testator executed two instruments at the same time containing a legacy of precisely the same amount to the same individual. In *Barclay* v. *Wainwright*,[2] the rule against cumulative legacies under different instruments was repelled by internal evidence by the circumstance that all the legatees by the first instrument were legatees in the second, except those who were dead or had quitted the testator's service.

In England, the rules as to substitutional or cumulative gifts are treated as rules of presumption rather than rules of construction, and parol evidence is admissible to rebut the presumption that a subsequent gift in the same will, or in a later testamentary document, is substitutional and not cumulative. It is admissible when the Court itself raises the presumption against double legacies, to show that the testator intended the legatee to take both, for that is in support of the apparent intention of the will. But where the Court does not raise the presumption, as where, for instance, legacies of equal amount are given *simpliciter* by different instruments, parol evidence is not admissible to show that the testator intended the legatee to take one only, for that is in opposition to the will.[3] Thus in *Hurst* v. *Beach*,[4] where a legacy of £300 was given by a will and a legacy of £500 by a codicil, evidence was tendered to show that the testatrix did not mean the second legacy as a further gift of £500. Sir JOHN LEACH, M. R., said,—"Such evidence cannot be received without breaking in upon the primary rule, that parol evidence is not admissible against the expressed effect of a written instrument."[5] It is not clear, having regard to the language of s. 88 of the Indian Succession Act, whether parol evidence would be allowed under s. 62 of the same Act, under circumstances where it would be admissible in England.

I pass now to a consideration of the law as to residuary bequests.

A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.[6] It is sufficient that the intention of the testator be plainly expressed in the will that the surplus of his estate, after payment of

[1] L. R., 17 Eq., 50.

[2] 3 Ves. 462; see *Allan* v. *Callow*, *Ibid*, 289.

[3] 2 White and Tud., L. C., 336.

[4] 5 Madd., 351.

[5] See *Gay* v. *Sharp*, 1 My. and K., 589; *Hall* v. *Hill*, 1 Dr. and War., 94, 116; and *Lee* v. *Pain*, 4 Hare, 216.

[6] Indian Succession Act, s. 89. This section applies to Hindus, etc., under the Hindu Wills Act.

debts and legacies shall be taken by a person designated.[1] Thus, where A made her will consisting of several testamentary papers, in one of which were contained the following words: "I think there will be something left, after all funeral expenses, &c., to give to B, now at school, towards equipping him to any profession he may hereafter be appointed to," B was constituted residuary legatee.[2] So, if A makes his will, with the following passage at the end of it, "I believe there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire B to do, and keep the residue for her own use and pleasure," B is constituted the residuary legatee.[3] Again, under a bequest of all the testator's property to B, except certain stocks and funds which are bequeathed to C, B is constituted residuary legatee.[4]

Under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect.[5] In other words, a residuary bequest will comprise all property which is not effectually disposed of by the will, whether by reason of lapse, remoteness of the bequest, or otherwise.[6]

Where a testatrix made a will which she declared to be her 'last will and testament,' and thereby appointed an executor, and after giving legacies, proceeded as follows: "After these legacies and my doctor's bills and funeral expences are paid, I leave (*sic*) to my sister M. P.," this was held to be a good gift of the residue to M. P.[7] So, where a will, after making a number of bequests, directed that "should there be any surplus after the above expenditure," that surplus should go in a certain and legitimate way, it was held, that the gift of the 'surplus' was a gift of the residue, and that the preceding bequests would, in the event of their proving invalid, fall into the residue, and pass with it under the will.[8]

In some cases it was considered that the expressions "*et cetera*" and "and other effects" after an enumeration of particular things were not sufficient to pass the general residue but must be confined to things *ejusdem generis*, the meaning

[1] Williams on Executors, p. 1460; *Hearne* v. *Wigginton*, 6 Madd., 120.

[2] Indian Succession Act, s. 89, illustration (*a*), following the case of *Leighton* v. *Bailie*, 3 M. and K., 267.

[3] *Ibid*, illustration (*b*), following the case of *Boys* v. *Morgan*, 9 Sim., 289.

[4] *Ibid*, illustration (*c*).

[5] Indian Succession Act, s. 90. This section applies to Hindus, etc., under the Hindu Wills Act.

[6] *Bernard* v. *Minshull*, 1 John., 276; see *Leake* v. *Robinson*, 2 Mer., 392.

[7] *Re Bassett's Estate*, L. R., 14 Eq., 54.

[8] *Dwarkanath Bysack* v. *Burroda Persaud Bysack*, 1 C. L. R., 566; (S. C.) I. L. R., 4 Calc. 443; *Chapman* v. *Brown*, 6 Ves., 404; *Mitford* v. *Reynolds*, 1 Ph., 185; *Fisk* v. *Attorney-General*, L. R., 4 Eq., 521; *Sadler* v. *Turner*, 8 Ves., 617.

being "and all other things like the proceding,"[1] but in more recent cases the tendency seems to be to give the widest signification to such expressions.

In *Hodgson* v. *Jex*,[2] where the testator after devising certain freehold property, devised "all my furniture, plate, linen and other effects that may be in my possession at the time of my death," JESSEL, M. R., said, "It is alleged that the words 'other effects' are to be cut down so as to mean that which is something like furniture, plate or linen. But the answer is that the words of a will ought to have their natural meaning given to them, unless there is some contrary intention appearing in the will. The mere fact that the testatrix enumerates some items before the words 'effects' does not alter the proper meaning of these words." Again, where the devise was of all my money, cattle, farming implements etc.," JESSEL, M. R., held the words "*et cetera*" passed the whole residuary estate.[3] Where general words are used in making a bequest followed by a specification of the property of the testator, introduced by such words as "*viz*," "namely," "consisting of," a similar construction is applied, the later words being treated as not restricting the general words but as added by way of enumeration or description of the chief particulars of which the estate consisted.[4]

In a case where the testator bequeathed the "whole residue of money" to A "except such things as the under-mentioned," it was held that the word "money," having regard to the context, was used in its general sense, and that it was sufficient to pass the residue.[5]

Since a will, as we have seen, speaks from the death of the testator,[6] it follows that where property has been specifically bequeathed, but at the death of the testator has ceased to answer the terms of the specific bequest, as where stock specifically given has been converted, it falls into the residue.[7]

When all *except* certain property is given by a residuary clause, and the excepted property is given to a legatee who dies in the lifetime of the testator, or the gift of the excepted property fails for remoteness, the excepted property will pass under the residuary clause.[8]

[1] *Newman* v. *Newman*, 26 Beav., 220; *Barnaby* v. *Tassel*, L. R., 11 Eq., 363. See *supra* pp. 152, 153.

[2] L. R., 2 Ch., 122.

[3] *Chapman* v. *Chapman*, L. R., 4 Ch. D., 800.

[4] *Bridges* v. *Bridges*, 8 Vin. Abr. Devise, 295, pl. 13; *Dean* v. *Gibson*, L. R., 3 Eq., 713; *Chalmers* v. *Storil*, 2 V. and B., 222; *King* v. *George*, L. R., 4 Ch. D., 435; *Sidgraves* v. *Brewer*, L. R., 15 Ch. D., 594.

[5] *In the goods of White*, L. R., 7 P. D., 65.

[6] Indian Succession Act, s. 77.

[7] *Mayfield* v. *Newton*, 2 Coll., 520 note.

[8] *Evans* v. *Jones*, 2 Coll, 516; *Thompson* v. *Whitelock*, 4 DeG. and J., 490; *Blight* v. *Hartnoll*, L. R., 23 Ch. D., 218.

In England, where a testatrix gave certain lands in the parish of H to A, B, and C, as joint tenants-in-fee, and devised to the plaintiff "the rest of my freehold hereditaments in the parish of H. and all my freehold hereditaments in the parishes of, &c." the devise to A, B, and C having been declared void, it was held, that the lands comprised in that devise did not pass under the gift, which was a specific gift, of the "rest of my freehold hereditaments in the parish of H," but was undisposed of.[1] That case was decided under s. 25 of the Wills Act, which is similar, as to real property, to s. 90 of the Indian Succession Act. It enacts that—"Unless a contrary intention shall appear by the will such real estate or interest therein as shall be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in the will." MELLISH, L. J., was of opinion, that the section only applied where there was "what might be called a universal residuary devise,—that is to say, a devise of all the residue of the testator's lands."

A residuary gift passes property over which the testator has a general power of appointment under s. 56 of the Indian Succession Act, and which he has not appointed, or has ineffectually attempted to appoint. Thus, where a testatrix, having a power of appointment over a sum of stock, appointed the stock to her sons, A and B, and she left the residue of her property to A, and B died before her,—it was held, that A was entitled as residuary legatee to the share intended for B.[2] In England, where a testator shows an intention not to include certain property in a residuary bequest, effect will be given to his intention.[3] In the case of *Davers* v. *Dewes*[4] the testator by his will declared his intention to dispose of his household goods by a codicil and devised the rest of his personal estate not disposed of by the codicil to his wife. He afterwards made a codicil but did not thereby dispose of his household goods, and it was held that the residuary legatee was not entitled to the household goods, but that they went to those entitled under the Statute of Distributions.[5] Here, apparently, if the bequest is really residuary (and whether it is or not, depends simply upon the will showing the intention of the testator to pass by the gift the residue of his property), property excluded from the residue and not otherwise disposed of must pass by the residuary bequest.

[1] *Springett* v. *Jennings*, L. R., 6 Chan., 333.

[2] *Spooner's Trust*, 2 Sim., N. S., 129.

[3] *Circuitt* v. *Perry*, 23 Beav., 275; *Davers* v. *Dewes*, 3 P. Wms., 40.

[4] 3 P. Wms., 40.

[5] See *Green* v. *Pertwee*, 5 Ha., 249; *Cunningham* v. *Murray*, 12 Jur., 547; *Evans* v. *Jones* 2 Coll., 516.

In *Blight* v. *Hartnoll*[1] the testator gave to C. H. all her personal property, except a certain warf which she bequeathed to purposes which failed, and it was held that the wharf fell into the residue belonging to C. H. But in that case, it was considered, there was no intention to exclude the wharf from the residue.[2]

It is hardly necessary to point out that under a residuary bequest, a legatee in this country is entitled to immoveable as well as moveable property.[3]

Before leaving the subject of residuary bequests it is necessary to deal with what is known as the doctrine of lapse for where a legacy lapses it falls into the residue of the testator's estate, unless the testator has guarded against this by directing that it should go to some other legatee.

The law, it is said, always leans in favour of early vesting of estates bequeathed or devised.[4] The effect of this principle "seems to be that property which is the subject of a disposition, whether testamentary or otherwise, will belong to the object of gift immediately on the instrument taking effect, or so soon afterwards as such object comes into existence, or the terms thereof will permit. As, therefore, a will takes effect at the death of the testator, it follows that any devise or bequest in favour of a person *in esse*,—*i. e.*, without any intimation of a desire to suspend or postpone its operation, confers an immediately vested interest."[4] In the case of a legacy given in general terms, without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and if he die without having received it, there is no lapse but the legacy passes to his representatives[5] If, however, the legatee does not survive the testator, the legacy, whether of moveable or immoveable property, cannot take effect, but is said to lapse and forms part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person. Accordingly, in order to entitle the

[1] L. R., 23 Ch. Div., 218.

[2] See L. R., 23 Ch. Div., p. 224; *per* LINDLEY, L. J., distinguishing *Davers* v. *Dewes*, 3 P. W., 40; *Winman* v. *Field*, Kay, 507.

[3] *Munmohun Ghosal* v. *Pureshnath Roy*, 22 W. R., 174.

[4] *Duffield* v. *Duffield*, 3 Bligh, N. S., 260.

[5] 1 Jarm., 799.

[6] Indian Succession Act, s. 91. This section applies to Hindus, etc., under the Hindu Wills Act. The use of the words 'to be paid' in the section would seem to confine its operation to pecuniary legacies; but it is submitted that the same principle which has always guided the English Courts would be applied here in the case not only of bequests of all kinds of moveable property, but also of devises of immoveable property.

The subject of vesting in case of legacies, where the payment or possession is postponed, or where the legacies are contingent on a specified uncertain event, is dealt with later.

representatives of the legatee to receive the legacy, it must be proved that he survived the testator.[1]

The doctrine of lapse, under the Indian Succession Act, as in England, applies, not only to personal estate, but also to real estate,[2] and to cases of appointments by way of bequest or devise, under powers.[3] In case of powers, the appointee must survive the donee of the power in order to take.[4]

In *Elliot* v. *Smith*[5] where the testator left legacies to three persons and directed that if any of them died, his share should go to the others, and one of the legatees and the testator were drowned at the same time, it was held, it was said, in accordance with a long series of cases,[6] that the word "die" meant "die in the lifetime of the testator" and that the legacy of the legatee who died, became part of the residue.

A devise or bequest will lapse if the legatee be dead before the making of the will, and in such a case it has been held that parol evidence is not admissible to show that the testator knew at the time of the making of the will that the legatee was dead[7] so as to raise a presumption that he intended there should be no lapse.

A bequest to a debtor of the *debt* due from him lapses like any other legacy,[8] Thus, if the testator bequeaths to B Rs. 500 which B owes him, and B dies before the testator, the legacy lapses.[9]

We have already seen that under such bequest as "to A and his children" and "to A and his executors or administrators," A takes the whole interest,[10] and accordingly, if A dies before the testator or happens to be dead at the date of the will, the bequest lapses.[11] Even, if such a legacy be confirmed by a subsequent codicil, in case of the death of the legatee since the date of the will, the lapse is not prevented so as to give the legacy to his children or his representatives.[12]

If a bequest is in the alternative, as to A or his heirs, or to A or his issue,

[1] *Ibid.*, 92. This section also applies to Hindus, etc., under the Hindu Wills Act.

[2] *Goodright* v. *Wright*, 1 P. Wms., 397; *Brett* v. *Rigden*, Plow., 340.

[3] *D. of Marlborough* v. *Ld. Godolphin*, 2 Ves. Sen., 61.

[4] *Freeland* v. *Pearson*, L. R., 3 Eq., 658.

[5] L. R., 22 Ch. D., 237.

[6] *Bindon* v. *Earl of Suffolk*, 1 P. Wms., 96; *Turne* v. *Moore*, 6 Ves., 556; *Cambridge* v. *Ruos*, 8 Ves., 12; *O'Mahoney* v. *Burdett*, L. R., 7 H. L., 338.

[7] *Maybank* v. *Brooks*, 1 Bro. C. C., 84.

[8] *Elliot* v. *Devenport*, 1 P. Wms., 84.

[9] Indian Succession Act, s. 92, illustration (*a*).

[10] *Supra*, p. 181; Indian Succession Act, s. 84.

[11] Indian Succession Act, s. 92, illustration (*b*); *Appleton* v. *Rowley*, L. R., 8 Eq., 139; *Maybank* v. *Brooks*, 1 Bro. C. C., 84.

[12] *Maybank* v. *Brooks*, 1 Bro. C. C., 84; *Hutcheson* v. *Hammond*, 3 Bro. C. C., 127.

or to A or his children, the '*or*' is in general construed as substitutional,[1] and the bequest will not lapse by reason of A's death in the lifetime of the testator.[2] But where a substitutionary gift follows a life-interest as where there is a bequest of a life-interest to A, followed by a bequest to B or his heirs, this has reference to B's dying in the lifetime of A, and not of the testator, and if B predeceases the testator, the bequest will lapse.[3]

A mere declaration that the gift shall not lapse is not effectual to prevent lapse if the legatee die in the lifetime of the testator, unless it is clear that it is to go to his estate in that event;[4] but if the testator, after such a declaration against lapse, gives a legacy to A and his executors and administrators this will be sufficient to show that the executors and administrators were to take in the event of A's death.[5] A declaration, however, that the legacy is to vest from the date of the will has been held, in the case of a similar legacy, not to be sufficient to prevent a lapse.[6] In *Browne* v. *Hope*,[7] the testator gave by will the residue of his estates to trustees, to pay the same to seven legatees named, in equal shares, as tenants in common, and their respective executors, administrators, and assigns, and declared that such shares should be vested in each legatees immediately upon the execution of the will. It was held, that the share of one of the legatees who died after the date of the will, but before the testator, did not belong to her legal representative, but had lapsed. WIGRAM, V.-C., said,—"A testator may prevent a legacy from lapsing, but the authorities show he must do one of two things: he must in clear words exclude lapse, or he must clearly indicate who is to take in case the legatee should die in his lifetime."[8] Thus, a bequest to such persons as A shall by deed or will appoint, and, in default, to his next-of-kin, will go to the next-of-kin in the event of A predeceasing the testator,[9] for a gift over in default of appointment does not fail by the death of the donee of the power in the lifetime of the testator.

Where there is a devise of an estate subject to the payment of an annuity, or of a debt to a creditor, the death of the intended devisee will not defeat the gift of the annuity or of the debt, for the estate remains charged.[10] So, where

[1] See s. 83 and illustration (*e*) to that section, *supra*, p. 180.

[2] *Gettings* v. *McDermott*, 2 M. and K., 69; *Re Porter's Trusts*, 4 K. and J., 188.

[3] *Corbyn* v. *French*, 4 Ves, 418, 435; see *Ridwell* v. *Ariel*, 3 Madd, 404, as qualified by *Re Porter's Trusts*, 4 K. and J., 188.

[4] *Pickering* v. *Stamford*, 3 Ves., 493; *Underwood* v. *Wing*, 4 D M. and G., 633; see *Aspinall* v. *Duckworth*, 35 Beav., 307.

[5] *Sibley* v. *Cook*, 3 Atk., 572.

[6] *Browne* v. *Hope*, L. R., 14 Eq, 343.

[7] L. R., 14 Eq., 343.

[8] *Ibid.*, p. 347.

[9] *Edwards* v. *Saloway*, 2 Ph., 625; *Jones* v *Southall*, 32 Beav., 31.

[10] *Wigg* v. *Wigg*, 1 Atk., 382; *Hills* v. *Wirley*, 2 Atk., 605; *Oke* v. *Heath*, 1 Ves. Sen., 135; see Indian Succession Act, s. 97.

a testator devised an estate at M to his son on the express condition that he should, within three months after the testator's death, relinquish all claim to a sum of £3,400 due to him by the testator, and, after devising other lands for sale for specific purposes, declared that the debt should not be paid out of the residue, it was held, that although the son predeceased the testator and there was consequently a lapse of the devise to him, the condition bound the estates and that the debt of £3,400 must be discharged from it.[1]

The doctrine of lapse applies to contingent bequests. Thus, if a sum of money is bequeathed to A on his completing his eighteenth year, and in case he should die before he completes his eighteenth year, to B, and A completes his eighteenth year, and dies in the lifetime of the testator, the legacy to A lapses, and the bequest to B does not take effect.[2]

In England, where there is a bequest to trustees in trust for the payment of debts to creditors, although the debts may have been discharged by a certificate in bankruptcy[3] or barred by limitation, there will be no lapse in the case of creditors who do not survive the testator;[4] but their representatives will take. In *Coppin* v. *Coppin*[5] it was held that where creditors had released their debts they must claim as voluntary legatees, and that their legacies must be subject to the general rule, but it is difficult to support this case upon principle.

The rule, that in order to entitle the representatives of a legatee to receive the legacy, it must be proved that he survived the testator, would cause a legacy to lapse if the testator and the legatee perished in the same catastrophe, as in the same shipwreck or fire and there was no evidence to show which died first.[6]

According to s. 93 of the Indian Succession Act "if a legacy is given to two persons jointly and one of them dies before the testator the other legatee takes the whole." It will be observed that the section in terms provides only for the case of a bequest to two persons, but it is submitted that the section is equally applicable to the case of a bequest to any number of persons jointly.[7] In England, the principle is applied not only where one of the joint legatees dies in the lifetime of the testator, but where the gift to one is revoked[8] or where one of the joint

[1] *In re Kirk*, L. R., 21 Ch. D., 431.

[2] Indian Succession Act, s. 92, illustration (*e*). This was the case of *Humberstone* v. *Stanton*, 1 V. and B., 385; see *Williams* v. *Jones*, 1 Russ., 517.

[3] *Re Sowerby's Trusts*, 2 K. and J., 630; *Turner* v. *Martin*, 7 D. M. and G., 429.

[4] *Philips* v. *Philips*, 3 Hare, 281; *Williamson* v. *Naylor*, 3 Y. and C., 208.

[5] 2 P. W., 295.

[6] Indian Succession Act, s. 92, illustration (*f*); see *Elliot* v. *Smith*, L. R., 23 Ch. D., 237.

[7] See *Morley* v. *Bird*, 3 Ves., 628.

[8] *Humphrey* v. *Tayleur*, Amb., 136.

tenants is incapable of taking, as for instance, where he was witnessed the will.[1]

In England, where there is a gift to legatees as tenants-in-common, as where a fund is to be divided among them *nominatim*, in equal shares, if any of them die before the testator, what was intended for them will lapse into the residue.[2] So, under the Indian Succession Act if a legacy is given, not to legatees jointly but to legatees in words which show that the testator intended to give them distinct shares of it, then, if any legatee dies before the testator, so much of the legacy as was intended for him will fall unto the residue of the testator's property,[3] as if a sum of money is bequeathed to A, B, and C to be equally divided between them and A dies before the testator, B and C will take only so much as they would have had if A had survived the testator[4]

It may be said generally that all expressions importing division by equal or unequal shares, or referring to the devisees as owners of respective or distinct interests, and even words simply denoting equality, will operate to create a tenancy-in-common. Thus, it has long been settled, that the words 'equally to be divided,'[5] or 'to be divided,'[6] will create a tenancy-in-common. So a devise or bequest to several persons 'equally amongst them,'[7] or 'equally '[8] or 'in equal moieties,'[9] or 'share and share alike '[10] or 'respectively,'[11] or with a limitation to their heirs 'as they shall severally die,'[12] or to 'several,' 'between,' or 'amongst' them,'[13] or 'to each of their several heirs,'[14] or to 'each' of several persons,[15] has been held to make the objects tenants-in-common.[16] In all these cases, on the death of any legatee, so much of the legacy as was intended for

[1] *Young* v. *Davies*, 2 Dr. and Sm., 167; 9 Jur., N. S., 399; *Fell* v. *Biddolph*, L. R., 10 C. P., 701; *In re Coleman*, L. R., 4 Ch. D., 165.

[2] *Bagwell* v. *Dry*, 1 P. Wms., 700; *Page* v. *Page*, 2 P. Wms., 488; *Appleton* v. *Rowley*, L. R., 8 Eq., 139; see *Humble* v. *Shore*, 7 Hare, 247; *In re Rhoades*, 29 L. R., Ch. D., 142.

[3] Indian Succession Act, s. 94. This section applies to Hindus, etc., under the Hindu Wills Act.

[4] *Ibid*, illustration.

[5] *Doe d. Liversage* v. *Vaughan*, 5 B and Ald., 464.

[6] *Peat* v. *Chapman*, 1 Ves. Sen., 542; *Ackerman* v. *Burrows*, 3 V. and B., 54.

[7] *Warner* v. *Hope*, 1 Eq., Ca. Ab., 293.

[8] *Denn* v. *Gasken*, 2 Cowp., 657.

[9] *Harrison* v. *Foreman*, 5 Ves., 207.

[10] *Heathe* v. *Heathe*, 2 Atk., 122.

[11] *Folkes* v. *Western*, 9 Ves., 456.

[12] *Sheppard* v. *Gibbons*, 2 Atk., 441.

[13] *Lashbrook* v. *Cock*, 2 Mer., 70; *Attorney-General* v. *Fletcher*, L. R., 13 Eq., 128; *Campbell* v. *Campbell*, 4 Bro. C. C., 15.

[14] *Gordon* v. *Atkinson*, 1 DeG. and S., 478.

[15] *Hatton* v. *Finch*, 4 Beav., 186.

[16] 2 Jarman on Wills, 257.

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him will fall into the residue, unless, the bequest be to the objects as a class, in which case the individuals composing the class at the death of the testator, or at the period fixed for distribution are, as we shall see, entitled, among them, whatever be their number, to the entirety of the subject of the gift.[1]

So far do the Courts always lean in favour of a tenancy-in-common,[2] that in the case of *Booth* v. *Alington*,[3] where the bequest was upon trust to pay, assign, and divide the same upon the death of the testator's daughter, unto and equally between all her children, if more than one, as *joint tenants*, and if but one then to such child, STUART, V. C., held, on the context of the will, that the use of the words 'joint tenants' should not be allowed to control the intention of the testator to create a tenancy-in-common previously expressed in the words 'pay,' 'assign,' and divide.'[4] Of course, if the bequest is to tenants-in-common, with a clause of survivorship, as to A and B, share and share alike, and if either should die without leaving issue, his share to go to the survivor, the share of A predeceasing the testator will not lapse.[5]

Where a testator bequeathed a fund to the children of B, as tenants-in-common, and directed that the shares of any members of the class who died before him leaving issue should not lapse, it was held that the direction against lapse in the case of those dying leaving issue did not have the effect of causing the shares of those who died without issue to lapse, but that the whole went to the survivors.[6]

No question of lapse arises where a bequest is made to a described class of persons, as, in that case, the legacy will go only to such as shall be alive at the testator's death.[7] Even, if the gift is of a particular sum to each member of a class, or to a class of persons as tenants-in-common, the class will be ascertained at the death of the testator, or at any other fixed period, and those answering the description at the time fixed will take the whole notwithstanding the death of any of the class in the lifetime of the testator.[8] But, if the gift is of a

[1] See *Shaw* v. *M'Mahon*, 4 Dr. and War., 431; *Knight* v. *Gould*, 2 My. and K., 295; *Re Soleman*, L. R., 4 Chan. Div., 165; 2 Jarman on Wills, 264. Intestate and Testamentary Succession in India, pp. 116, 117.

[2] *Jolliffe* v. *East*, 3 Bro. C. C., 25; see *per* LORD THURLOW, p. 26.

[3] 27 L. J., Chan., 117.

[4] Intestate and Testamentary Succession in India, pp. 116, 117.

[5] *Mackinnon* v. *Peach*, 2 Keen, 555; *Rackham* v. *De la Mare*, 10 Jur., N. S., 190.

[6] *Aspinall* v. *Duckworth*, 35 Beav., 307.

[7] Indian Succession Act, s 98. This section is embodied in the Hindu Wills Act, but in applying it under the latter Act "son," "sons," "child" and "children" include an adopted son; and the word "grandchildren" includes the children whether adopted or natural born of a child whether adopted or natural born, and the expression "daughter-in-law" includes the wife of an adopted son—Act XXI of 1870, s. 6.

[8] *Rungrose* v. *Bramham*, 2 Cox., 384; *Butler* v. *Lowe*, 10 Sim., 317; *Shuttleworth* v. *Greaves*,

particular portion of the whole to each of a class, in that case the survivors will take only their original shares and the shares of those who predecease the testator will go as undisposed of.[1]

In *Christopherson* v. *Naylor*[2] a rule was laid down that, where there was a gift to a class and then a substitutionary gift of the share of any one of the class who should die in the lifetime of the testator, no one could take under the substitutionary who was not able to predicate that his parent might have been one of the original class, and consequently, if his parent was dead at the date of the will, and therefore, by no possibility, could have taken as one of the original class, his issue would be unable to take under the substitutionary gift. That rule was followed in the Court of appeal in *Hunter* v. *Cheshire*[3] and in *West* v. *Orr*.[4] It was also followed in *In re Webster's Estate*[5] where there was a bequest to "all the children of M, or, in the event of their decease, to their descendants, share and share alike." M had six children, of whom five were living at the date of the will and at the date of the testator's death, and one had died prior to the date of the will leaving issue. KAY, J. held that the issue of the child of M, who died before the date of the will, were not entitled to a share in the property bequeathed, but that it went to the five children who survived the testator.

Both under the English Wills Act[6] and the Indian Succession Act[7] special provision is made to prevent a lapse in case of bequests to the children or other lineal descendants of the testator. The provisions of section 96 of the Indian Succession Act are as follows: "Where a bequest shall have been made to any child or other lineal descendant of the testator, and the legatee shall die in the lifetime of the testator, but any lineal descendant of his shall survive the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." They are practically the same as those of s. 33 of the Wills Act, the words "other lineal descendant" being substituted for "other issue."

4 My and Cr., 38; *Leigh* v. *Leigh*, 17 Beav., 605; *Fitzroy* v. *Duke of Richmond*, 27 Beav., 186; *Ramsay* v. *Skelmerdale*, L. R., 1 Eq., 129; *Dimond* v. *Bostock*, L. R., 10 Ch., 358

[1] *Page* v. *Page*, 2 P. W. 489

[2] 1 Mer., 320

[3] L. R., 8 Ch., 751

[4] L. R., 8 Ch. D., 60

[5] L. R., 23 Ch. D., 737

[6] 1 Vict., c. 26, s. 33.

[7] S. 96. This section is embodied in the Hindu Wills Act, but in applying it under the latter Act "son," "sons," "child" "children" include an adopted son; and the word "grandchildren" includes the children whether adopted or natural born of a child whether adopted or natural born, and the expression "daughter-in-law" includes the wife of an adopted son.—Act XXI of 1870, s. 6

Neither the English nor the Indian Act substitutes for the predeceased legatee the lineal descendant whose existence is the event or condition which excludes the lapse, but it renders the subject of the gift the absolute property of the predeceased legatee, and therefore disposable by his will, notwithstanding his death before the death of the testator.[1] The legacy is a vested interest in the legatee.[2] In *Re Mason's Will*,[3] it was considered doubtful by ROMILLY, M. R., whether the will of a legatee who predeceased his father, the testator, should be construed according to the event, or whether it should be construed as if the legatee had survived the testator, or, in other words, as if the testator had predeceased the legatee. If the legatee has not made a will, the property will devolve as his own property would, on his intestacy.[4]

It seems that to prevent the lapse of a legacy, it is not necessary under s. 33 of the English, or s. 96 of the Indian Act, that the lineal descendant, who is alive at the death of the testator, should be the same lineal descendant who was alive at the death of the legatee. It is sufficient that any lineal descendant —*e. g.*, a grandchild of the legatee -should be in existence at the death of the testator.[5] "I think," said SIR C. CRESSWELL in the case of *In the goods of Parker*, "it is a fair presumption that the intention of the Act was to preserve the legacy whenever there might be any issue of the legatee alive at the death of the testator.[6]

Under Hindu law and under s. 99 of the Indian Succession Act, which applies to Hindus, a person to be capable of taking under a will must either be in existence in fact or in contemplation of law. It appears to follow, therefore, that, in the case of a Hindu will coming within the circumstances stated in s. 96 of the Indian Succession Act, the legatee dying in the lifetime of the testator leaving a lineal descendant must, in order to be able to take the legacy without offending against the principles of Hindu law, be treated as a person in existence in contemplation of law—or as, having a statutory existence.[7]

It would seem that section 96 of the Indian Succession Act, like s. 33 of the Wills Act,[8] would apply in a case where a testator, in providing for an absent

[1] *Johnson* v. *Johnson*, 3 Hare, 157

[2] *In the goods of Parker*, 1 Sw and Tr, 523.

[3] 34 Beav., 495.

[4] *Winter* v. *Winter*, 5 Hare, 306; *Wisden* v. *Wisden*, 2 Sm. and Giff.' 396; *Mower* v. *Orr*, 7 Hare, 473.

[5] *In the goods of Parker*, 1 Sw. and Tr., 523.

[6] *Ibid*, p 525. Intestate and Testamentary Succession in India, pp. 110, 119.

[7] This construction has been put upon s. 96 of the Indian Succession Act in a case decided on the 2nd April 1889, while these Lectures were going through the press— Reg. Appeal No. 97 of 1885 Tottenham and Gurudass Banerjee, JJ.—*Jitu Lal Mahta* v. *Binda Bibee*.

[8] *Winter* v. *Winter*, 5 Hare, 306; *Mower* v. *Orr*, 7 Hare, 473.

child, was ignorant of his death, for the intention of the Legislature in England in framing s. 33, which that section closely follows, was to prevent a portion given by a testator to a child going from the estate of such child, and his family from being left portionless by reason only of the death of the child under certain circumstances.[1] It seems, also, that the provisions of the Indian Act would apply to a testamentary appointment under a general power, though there is a gift over in default of appointment,[2] but not under a special power.[3] They do not apply to a gift to a *class*,[4] but only to a strict lapse, for, under a gift to a class, the share to which a child would have been entitled, had it survived, does not lapse in consequence of his death in the testator's lifetime.

The provisions against the lapse of legacies to children render it necessary for a testator intending that a legacy to one child shall go over to another, in the event of the death of the first legatee, to express that meaning by his will.[5]

Where the deceased, a legatee under the will of her father, died in his lifetime, leaving issue living at his death and also a husband, who died before the father, having made a will, the Court granted administration to the son of the deceased as if she had died immediately after the death of the testator.[6] In the case of *In re Hensler*,[7] a father devised a freehold house to his son, and his residuary estate to trustees in trust for other persons. The son died in his father's lifetime leaving issue living at his father's death and having by his will devised all his real estate to his father, and it was held that, as under s. 33 of the Wills Act, the son must be deemed to have survived the father, the house passed to the son absolutely under the father's will and became subject to the testamentary disposition by the son, but that, as by the will of the son the property was devised to his father, the devise by the son failed and his heir at law was entitled to the property.

If a bequest is made to one person for another, the legacy does not lapse by the death in the testator's lifetime of the person to whom the bequest is made.[8] Thus, if a bequest is made to a man in trust for another, the legacy will not

[1] See *Winter* v. *Winter*, 7 Hare, p. 313; *per* WIGRAM, V. C.

[2] *Eccles* v. *Cheyne*, 2 K. and J., 676.

[3] *Griffiths* v. *Gale*, 12 Sim., 354; *Freeland* v. *Pearson*, L. R., 3 Eq., 658; *Holyland* v. *Lewin*, L. R., 26 Ch.D.,266

[4] *Olney* v. *Bates*, 3 Drew., 323 *Browne* v. *Hammond*, Johns, 215.

[5] *In re More's Trust*, 10 Hare, 178. See *Fullford* v. *Fullford*, 16 Beav., 565.

[6] *In the goods of Councell*, L. R., 2 P. and D., 314; See *In re Hone's Trusts*, L. R, 22 Ch. D., 663.

[7] 19 Ch. D., 612.

[8] Indian Succession Act, s. 97. This section applies to Hindus, etc., under the Hindu Will Act.

lapse by the death of the trustee in the testator's lifetime,[1] or, if there is a gift to A charged with a legacy to B, and A dies in the lifetime of the testator, B will be entitled to the legacy.[2] On the other hand, a devise of the legal estate or interest to a trustee will not be rendered void, although the *cestui que trust* predecease the testator.[3] So, where there is a devise to A charged with a legacy to B, provided B attain a particular age, the devise to A is absolute, unless B attain that age.[4]

Although a share of a legacy, which has been given to different persons in distinct shares, lapses and falls into the residue, yet where the share that lapses is a part of a general residue bequeathed by the will, the share is treated as undisposed of, and does not enure to the benefit of the other residuary legatees, but goes to the next of kin.[5] This rule, which has been adopted by the Indian Succession Act, is the well-known rule which is illustrated in the case of *Skrymsher* v. *Northcote*.[6] There, the testator gave his residuary estate to his two daughters, but directed that if either of them should die leaving no issue, out of the moiety of her so dying, £500 should be paid to H, and that "the remainder of that moiety" should be paid to the other sister. The testator revoked the gift of £500 without making any fresh disposition of it, and one of the sisters died leaving no issue. It was held, that the £500 went to the next-of-kin. SIR J. PLUMER, M. R., said: "It seems clear, on the authorities, that a part of the residue, of which the disposition fails, will not accrue in augmentation of the remaining part as a residue of a residue, but instead of resuming the nature of residue, devolves as undisposed of. Residue means all of which no effectual disposition is made by the will *other than the residuary clause;* but when the disposition of the residue itself fails, to the extent to which it fails, the will is inoperative."[7]

It frequently happens that testators devise the residue of their property in certain shares and direct that in a certain event a share shall fall into the residue. In such a case the direction is mere surplusage and the share is disposed of according to law.[8] In *Humble* v. *Shore*,[9] there was a gift in the

[1] *Eales* v. *England*, 2 Vern., 468; *Oke* v. *Heath*, 1 Ves. Sen., 140.

[2] *Wigg* v. *Wigg*, 1 Atk., 382.

[3] *Doe* v. *Edlin*, 4 Ad. and E., 582.

[4] *Tregonwell* v. *Sydenham*, 3 Dow. H. of L. Rep., 194.

[5] Indian Succession Act, s. 95, which, with certain explanations, applies to Hindus, etc., under the Hindu Wills Act—Act XXI of 1870, ss. 2, 6; *Skrymsher* v. *Northcote*, 1 Swanst., 566; *Lightfoot* v. *Burstall*, 10 Jur., N. S., 308; *Sykes* v. *Sykes*, L. R., 3 Ch., 301; *Crawshaw* v. *Crawshaw*, L. R., 14 Ch. D., 817.

[6] 1 Swanst., 566.

[7] *Ibid.*, p. 570; see also *Sykes* v. *Sykes*, L. R., 3 Chan., 301

[8] See *Humble* v. *Shore*, 7 Hare, 247.

[9] 7 Hare, 247; see *In re Barker's Estate*, L. R., 15 Ch. D., 635.

will of one-sixth of the testator's residuary estate to S. W. but this gift was revoked by a codicil which gave the same one-sixth to the S. W. for life, with a direction, that, after her decease, a legacy should be paid thereout, and that the remainder of such sixth should sink into the residue. It was held, that the remainder of the sixth of the residue was not thereby given to the other residuary legatees but was undisposed of. The decision proceeded upon the ground that there was a distinct and separate share given to be applied as directed by the will, and that share lapsed.

In *In re Rhoades*[1] the testator bequeathed the residue of his personal estate to his wife for life, and after her death to his sister and three brothers in equal shares, but directed that in the event of his sister dying unmarried in his wife's lifetime (which event happened) her one-fourth share should fall into the residue; it was held that there was no intestacy as to the sister's one-fourth, but that the whole residue was on the widow's death divisible in thirds between the three other legatees, the testator being treated, in disposing of the residue, as having meant to say that it should be divided into four shares, but that in an event which might happen another division might be necessary, namely, a division into thirds -in other words that, if there should be four persons, it should be rendered into four, if only three persons, into three parts. Somewhat similar reasoning was applied in the case of *In re Spiller*.[2] There the testator gave the residue of her estate equally between a number of persons, whom she named, and such of the children of J. G. as were living at the date of her will. J. G. had died before the date of the will leaving no children. It was held that there was no lapse as there had in fact been no gift, and that the residue was divisible among the other persons named. The direction to divide the residue was treated as in effect a direction to divide it among the persons named and the children of J. G., if there were any such living at the date of the will. In *In re Roberts*,[3] the testator bequeathed the residue of his personal estate to trustees upon trust for a nephew and three neices, by name, equally between them, and he declared that his trustees should retain the share of each of the neices, upon trust, to pay the income to her during her life for her separate use, and after her decease, as to the capital thereof, upon trust as she should by will appoint, and in default of appointment, upon trust for her child or children, sons at twenty-one and daughters at twenty-one or marriage, equally between them, if more than one. One of the neices married and died before the testator leaving an infant daughter, and it was held that her share lapsed and that there was an intestacy in respect of it.

[1] L. R., 29 Ch. D., 142.

[2] L. R., 18 Ch. D., 614.

[3] L. R., 27 Ch. Div., 345; following *Stewart* v. *Jones*, 3 DeG. and J., 532; see *Unsworth* v. *Speakman*, L. R., 4 Ch. D., 620.

There may be a particular residue as distinguished from a general residue, and the particular residuary legatee may be entitled to the benefit of any failure of gift out of the particular residue. Thus, under a gift of certain specified property to A, after payment of particular legacies, and of the general residue to B, A is entitled to the legacies which fail.[1] It is a general rule that where a will disposes of a variety of property belonging to the testator and winds up with a gift of the remainder or of the residue, the gift is to be treated as a gift of the general residue, but each case must depend upon the particular circumstances and the framing of the will.[2] In the case of *Ommaney* v. *Butcher*,[3] the testator after bequeathing to A and B legacies of stock and giving several legacies to public charities appointed A and B his executors and after directing his books, jewels and furniture to be sold, gave various small sums as legacies to different persons, and concluded his will thus: "In case there is any money remaining I should wish it to be given in private charities." It was held, that this residuary clause did not comprehend the general residue of the testator's estate consisting of leaseholds and money in the funds, but was confined to the residue of the produce of the articles which the testator directed to be sold. So, in *Wrench* v. *Jutting*,[4] where the testator bequeathed to A his household furniture and other like things "and all other goods of whatever kind," and directed that certain specified monies should be divided in a particular manner after all his debts should be paid off, and he then specified certain legacies and proceeded thus "£3000 to £4000 or whatever remaining sum or sums to A," it was held that A did not take the general residue.[5]

In *Champney* v. *Davy*,[6] a testatrix bequeathed certain specified portions of her personal estate to trustees upon trust for sale and conversion, payment of debts and legacies, investment and payment of the income to her mother for life, and, after her death, as to £2000, part of the fund, to pay the same to the Vicar of M, to be disposed of at his discretion "in or about restoring, altering, etc., the church, parsonage and school" of M, and, as to the residue thereof, upon the trusts afterwards declared by the will concerning moneys to arise from the sale of her real estate. The testatrix then gave "all the rest, residue and remainder of her personal estate" to her mother absolutely and devised her real estate to the same trustees in trust for sale, and directed them to hold the sale moneys and the residue of said trust money, stocks, funds, shares and securities in trust for the children of C absolutely. An inquiry was directed as to what

[1] *De Trafford* v. *Tempest*, 21 Beav., 564.

[2] *Jull* v. *Jacobs*, L. R., 3 Ch. D., 703.

[3] T. and R., 260.

[4] 3 Beav., 521.

[5] See *Boys* v. *Morgan*, 3 M. and C., 661; *Markham* v. *Ivatt*, 20 Beav., 579

[6] *Champney* v. *Davy*, L. R., 11 Ch. D., 949.

sums would be required in restoring, altering, etc., the church, parsonage and school, and it was held, that the legacy for that purpose was valid to the extent of the money ascertained to be required and that so much of the £2000 as failed passed to the legatees of the particular residue of the fund out of which it was given and not under the general gift of residuary personal estate. In dealing with this case HALL, V. C. expressed an opinion that the construction of a particular residuary gift was unaffected by the absence or presence of a general residuary gift.

If a general residue be undisposed of it must be divided among all the next-of-kin, notwithstanding that the testator has by his will directed that one of them shall take no share in his property.[1]

Where a bequest is made to a class of persons under a general description only, it is a rule that no one to whom the words of the description are not in their ordinary sense applicable is entitled to the legacy.[2]

There is this distinction as pointed out by Lord Cottenham between a gift to a class and a gift to individuals. The former implies an intention to benefit those who constitute the class and to exclude all others, while a gift to individuals by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named.[3] Questions, however, frequently arise as to whether a gift is a gift to a class or to individuals. A gift to "my daughters A, B and C (by name) and their issue", *simpliciter*, is merely a gift to the persons named and if any one should have died in the lifetime of the testator there would have been a lapse of his share.[4] But if the gift is to "my daughters A, B and C (by name) and their issue," and the will contains a further direction that any daughter born subsequently should, participate equally with those names, it is a gift to a class consisting of the daughters named and all other daughters thereafter to be born.[5] A gift to my "nine children" is not a gift to a class.[6] Where, however, the bequest of a residue was to a son and four daughters, *nominatim*, the testator having two sons and four daughters all of age at date of will, and "such of my child or children, as should attain 21 years or marry, in equal shares as tenants-in-common, but subject, as to the share of any daughter, whether now living or a child hereafter to be born to the trusts following—"the share of" such daughter being settled, it was held that the five named took as a class and not as individuals and that the whole residue was divisible among the three who

[1] 4 Beav., 318.

[2] Indian Succession Act, s. 85. This section applies to Hindus, etc, under the Hindu Wills Act.

[3] *Per* LORD COTTENHAM, *Barber* v. *Barber*, 3 My. and Cr., 688.

[4] *Re Stanhope's Trusts*, 27 Beav., 201, p. 203.

[5] *Re Stanhope's Trust*, 27 Beav., 201.

[6] *In re Smith's Trusts*, L. R., 9 Ch. D., 117; *In re Stansfield*, L. R., 15 Ch. D., 84.

survived the testator, the other two having died without issue.[1] The testator in that case had in effect treated the five persons named as a class. Any persons, not strictly constituting a class may be so treated by the testator as to constitute a class. Thus, a gift to A and the daughters of B and a gift to the daughters of A and the daughters of B are both gifts to a class.[2]

In *Shaw* v. *M'Mahon*[3] the gift was "amongst all my children living at my death, including my sons, B and W," and by a codicil the gift to W was revoked, and the gift was held by LORD ST. LEONARDS, to be a gift to a class.[4] A gift, however, to H for life and at his death to be equally divided between his surviving children and his neice R, is not, it was held in *Drakeford* v. *Drakeford*,[5] a gift to a class, because a class, though not the number constituting a class, must be ascertained at one and the same time R having died in the lifetime of the testator, there was a lapse.[6] In *Aspinall* v. *Duckworth*,[7] where the gift was unto and equally amongst the testator's nephew, A (A not being a child of B) and the children of his sister B, or their respective executors, it was held that the gift was to a class, and that if one of them happened to die in the testator's lifetime, the survivor or survivors would take the whole.[8] If there is a direction in the will that the gift is to be vested at the testator's death, then, in the case of a bequest to all the children of J. D. and to R. A., there will be no lapse, as in the case of *Drakeford* v. *Drakeford*,[9] but the gift will go to those who survive.[10] A gift to all the nephews and neices of the late husband of the testatrix who were living at the time of his decease, except A and B, was held to be a gift to aclass [11]

Both according to English Law and the Indian Succession Act, where there is a bequest simply to a described class of persons the thing bequeathed will go only to such as shall be alive at the testator's death.[12] But this rule is subject, under the Indian Act, to this exception, that if property is bequeathed to a class of persons described as standing in a particular degree of kindred to a

[1] *In re Jackson*, L. R., 25 Ch. D., 162; *Re Stanhope's Trust*, 27 Beav., 201.

[2] *Re Stanhope's Trusts*, 27 Beav, 201, *In re Jackson*, L. R, 25 Ch. D., 162.

[3] 4 D. and W., 431.

[4] *Clark* v. *Phillips*, 17 Jur., 886.

[5] 33 Beav., 43; see *In re Featherstone's Trusts*, L. R., 22 Ch. D., 111; *In re Ann Wood's Will*, 31 Beav., 323; *Re Chaplin's Trusts*, 33 L. J., Ch. 163; *Wilson* v. *Atter*, 44 L. T., N. S., 240.

[6] *Drakeford* v. *Drakeford*, 33 Beav., 43.

[7] 35 Beav., 307.

[8] See *In re Featherstone's Trusts*, L. R., 22 Ch. D., 111.

[9] *Supra*.

[10] *In re Featherstone's Trusts*, L. R., 22 Ch. D., 111.

[11] *Dimond* v. *Bostock*, L. R., 10 Ch., 358; *Viner* v *Francis*, 2 Bro. C. C, 655; *Lee* v *Pain*, 4 Hare, 201; *Leigh* v. *Leigh*, 17 Beav., 605; but see *Cruse* v. *Howell*, 4 Drew., 215, *per* KINDERSLEY, V. C.

[12] Indian Succession Act, s. 98. This section applies to Hindus etc. with certain necessary modifications—Act XXI of 1870, ss. 2, 6.

specified individual, but their possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise, the property will at that time go to such of them as shall be then alive, and to the representatives of any of them who have died since the death of the testator.[1] In England, generally speaking, every person who *at the time of the testator's death* falls within the described class will be entitled; but where it appears from express declaration, or clear inference upon the will, that the testator intended to confine his bequest to those only who answered the description at the *date of the instrument*, such intention must be carried into effect.[2] A Court of Equity, however, is always anxious to include all children in existence at the time of the testator's death, and particularly when he stands in the relation of parent to child. Presuming that a testator intended to do his duty in providing for all his children at his death, the Court will lay hold of any general expression to give effect to his presumed intention, and will not permit such general expression to be narrowed by the context.[3]

A child *en ventre sa mère* is considered to be in existence at the testator's death[4] and will be included in a simple bequest to children. But children, not *en ventre sa mère*, but born afterwards will not be included where a bequest is immediate to children as a class, although the bequest be to children "begotten or to be begotten" or "that may be born."[5] Similarly, where the period of distribution is subsequent to the testator's death although a child who falls under the description then is entitled, although not born at the testator's death, no child born after the period is entitled,[6] and that, also, even where the words "born or to be born" or similar words are added.[7]

According to English law, in the case of an immediate gift, if there are no children born at the death of the testator, or, where a prior interest is given, at the period of vesting in possession, all children subsequently born are let in;[8] but under section 90 of the Indian Succession Act if there be no object in being answering to the description of the class, the bequest is void.[9]

[1] *Ibid*; see *Hughes* v. *Hughes*, 14 Ves., 256.

[2] *Sheier* v. *Bishop*, 4 Bro. C. C, 55.

[3] *Matchwick* v. *Cock*, 7 Ves., 609; *Freemantle* v. *Taylor*, 15 Ves, 363; *In re Deighton's Trust*, L. R., 2 Ch., Div., 783; Williams on Executors, p 1093—4.

[4] *Clarke* v. *Blake*, 2 Bro. C. C., 319; *Pearce* v. *Carrington*, L. R., 8 Chan., 969; see *In re Emery's Estate*, L. R., 3 Chan. Div., 300.

[5] *Sprackling* v. *Ranier*, 1 Dick., 344; *Early* v. *Middleton*, 14 Beav., 453; *Storrs* v. *Benbow*, 2 M. and K., 46, (S. C.) 3 DeG. M. and G., 390.

[6] *Gimlett* v. *Purton*, L. R., 12 Eq., 427; see *Iredell* v. *Iredell*, 25 Beav., 485; *Bateman* v. *Gray*, L. R., 6 Eq, 215.

[7] *Whitbread* v. *St. John*, 10 Ves., 152; *Parsons* v. *Justice*, 34 Beav., 598.

[8] Williams on Executors, p. 1096. See *Weld* v. *Bradbury*, 2 Ver, 75; *Shepherd* v. *Ingram*, Amb., 448; *Hutcheson* v. *Jones*, 2 Madd., 124; *Wyndham* v. *Wyndham*, 3 Bro. C. C., 58.

[9] See illustrations (*b*) and (*f*) to s. 98 of the Indian Succession Act

In the case of *Ram Lall Sett* v. *Kanai Lall Sett*,[1] which was a case on the construction of a deed, WILSON, J. had occasion to examine the authorities as to gifts to a class generally and gifts to a class tainted with the vice of remoteness, which will be dealt with later. "In dealing" he said, "with a gift to a class you inquire, first, at what period the class is to be ascertained—it may, in the case of a will, be on the death of the testator, or at a later period. If the class is to be ascertained on the death of the testator no question of remoteness can arise and the general rule is that the gift takes effect in favour of such of the class as are then capable of taking. If the ascertainment of the class is deferred to a later date, those who become members of the class within the extended period are admitted and, subject to any question of remoteness, those, who are thus capable of taking, take. In either case, if any members of the class are incapable of taking because born after the date of ascertainment, they are simply excluded and the rest take the whole, and this is so even if the gift to be persons born and to be born.[2] If any die in the testator's lifetime they are simply excluded and the rest take the whole;[3] if the gift to one is revoked by codicil he is simply excluded and the rest take the whole.[4] If one is incapacitated because he has attested the will he is simply excluded and the rest take the whole.[5] In many of the cases the decision was based upon the special doctrines of English law applicable to joint tenancy, but *Fell* v. *Biddolph*[6] and *In re Coleman*[7] show that the rule is the same where no joint tenancy comes in. The Indian Succession Act in s. 98 declares the law applicable to wills governed by that Act in accordance substantially with the view I have explained."

The rule laid down by the section referred to, it seems, would apply where the gift is of a particular sum to each member of a class, and the class is fixed at the death of the testator.[8]

If there be a preceding life or other interest, as in the exception to section 98 of the Indian Succession Act, the distribution of the fund is suspended, and the class entitled will be the children, or as the case may be, living at the death of the testator, and also those born afterwards, but before the determination of the life or other prior interest.[9] It is because the interests vest in each

[1] I L. R., 12 Cal., 663, p 679.

[2] *Sprackling* v. *Ranier*, 1 Dick., 344; *Ayton* v. *Ayton*, 1 Cox., 327; *Whitbread* v *Lord St. John*, 10 Ves, 152; *Mann* v. *Thompson*, Kay, 638.

[3] *Stewart* v. *Sheffield*, 13 East, 526; *Re Coleman*, L R., 4 Ch. D., 167.

[4] *Shaw* v. *McMahons*, 4 Dr. P. W., 431.

[5] *Young* v. *Davies*, 2 Dr. and S., 167; *Fell* v. *Biddolph*, L. R., 10 C. P., 701.

[6] L. R., 10 C. P. 701.

[7] L. R. 4 Ch. D. 167.

[8] *Ringrose* v. *Bramham*, 2 Cox, 384; *Butler* v *Lowe*, 10 Sim, 317.

[9] *Middleton* v. *Messenger*, 5 Ves, 136; *Walker* v. *Shore*, 15 Ves., 122, *Barnaby* v. *Tassell* L R, 11 Eq., 363.

member of the class as he comes into being that, if he die before the period of distribution,[1] the representatives of such as have died since the death of the testator will be entitled along with those alive at the period of distribution.[2] Where the distribution is to be made when *all* attain, or when the youngest attains, a particular age, all children will be admitted, and not merely those who happen to be living when the youngest attains the particular age.[3] But where the period of distribution is postponed until the members of a class—*e. g.*, children—attain a particular age, the rule is to let *all* in until there must be a distribution of a share to *one*. Accordingly, if any member of the class has attained that age at the death of the testator, the class is then ascertained.[4] If no child has attained that age, the class is ascertained as soon as any one child does, and all members of the class born at the death of the testator, or coming into existence before the first attains the particular age, are entitled, to the exclusion of those born afterwards.[5] In *Locke* v. *Lamb*,[6] there was a bequest of a sum of stock to be divided between all the children of A. B., as they should attain his or her age of 21 years; and it was held that the fund was to go to such of the children of A. B. as were living when the first attained 21, and who had attained or who should attain 21. If the testator merely declares that the interests are to be vested at 21, the class is ascertained at his death.[7]

In *Berkeley* v. *Swinbourne*,[8] the testator bequeathed his residue in trust for his mother for life, with remainder in trust for the children of his two sisters in equal shares as tenants-in-common, to be vested interest, in the sons at twenty-one, and in the daughters at that age or on marriage. The testator's mother died a few months after him, and his sister had several children some of whom were born after the death of his mother. It was held that the mother's death was the period at which the shares vested and consequently that after-born children were not entitled to participate in the funds.

In *Maseyk* v. *Fergusson*,[9] PONTIFEX, J. expressed an opinion, that s. 98 of the Indian Succession Act applied only to vested interests.

[1] *Attorney-General* v. *Crispin*, 1 Bro. C. C., 386; *Middleton* v. *Messenger*, 5 Ves, 136.

[2] See illustrations (*d*) and (*e*) to s. 98 of the Indian Succession Act.

[3] *Mainwaring* v. *Beevor*, 8 Hare, 44; *Hughes* v. *Hughes*, 14 Ves, 256.

[4] *Hogger* v. *Payne*, 23 Beav., 474.

[5] *Andrews* v. *Partington*, 3 Bro. C. C., 401; *Barrington* v. *Tristram*, 6 Ves, 345; *Oppenheim* v. *Henry*, 10 Hare, 441; *Whitbread* v. *St. John*, 10 Ves., 152.

[6] L. R, 4 Eq., 372.

[7] *Berkeley* v. *Swinbourne*, 16 Sim., 275. Intestate and Testamentary Succession in India, p. 122.

[8] 16 Sim., 275.

[9] I. L. R., 4 Cal., 304

It has already been pointed out in dealing with the subject of lapsed bequests that if the legatee does not survive the testator, the bequest lapses and forms part of the residue of the testator's estate, unless it appears by the will that the testator intended that it should go to some other person. It may happen, however, that a bequest is given under a particular description to a person not yet come into existence either at the date of the will or of the testator's death, and in such case there is no lapse.

Section 99 of the Indian Succession Act, after laying down the rule that a bequest is void when made to a person by a particular description, and no person answering the description is in existence at the testator's death, allows an exception when such person stands in a particular degree of kindred to a specified person, but his possession is deferred by reason of a prior bequest or otherwise. The exception expressly declares that the gift is to take effect if any person answering the description comes into existence between the death of the testator and the time to which possession is referred.

If section 99 of the Indian Succession Act, as pointed out by WILSON, J.,[1] stood alone, it would absolutely and without restriction empower a testator to whom it was applicable[2] to give his property to unborn persons standing in any particular degree of kindred, provided those persons came into existence before the gift is to take effect in possession. Sections 100 and 101 of the Indian Succession Act, which like s. 99, are, however, embodied in the Hindu Wills Act,[3] lay down restrictions upon the power conferred by s. 99. Section 100 provides, in effect, that the deferred bequest must comprise the whole of the remaining interest of the testator in the thing bequeathed,[4] and section 101, which is general in its terms, invalidates any bequest which delays the vesting beyond a life or lives in being and the minority of the donee, who must be living at the close of the last life. Under the general Hindu Law which applies in cases to which the Hindu Wills Act is not applicable, a gift to persons unborn at the death of the testator is void,[5] and this is also true under

[1] *Alangamanjori Dabee* v. *Sonamoni Dabee*, 9 C. L. R., 121; I. L. R., 8 Cal., 157. See *supra* p. 203, note (7).

[2] It applies to Hindus, etc, under Act XXI of 1870, s. 2.

[3] See *Alangamanjori Dabee* v. *Sonamoni Dabee*, I. L. R., 8 Cal., 637 and *Ram Lal Sett* v. *Kanai Lal Sett*, I. L. R., 12 Cal., p. 669 as to whether ss. 100, 101 and 102 have any application to Hindu wills, regard being had to the s. 3 of the Hindu Wills Act.

[4] Section 100 is as follows:—Where a bequest is made to a person not in existence at the time of the testator's death subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

[5] *Tagore* v. *Tagore*, 9 B. L. R, 377; *Kherodemoney Dossee* v. *Doorgamoney Dossee*, I. L. R., 4 Cal., 455, (S. C), 3 C. L. R., 315; *Alangamanjori Dabee* v. *Sonamoni Dabee*, 10 C. L R. 459 (S. C.), I. L. R., 8 Cal., 637.

the Hindu Wills Act, which was passed, shortly before the decision of the Privy Council in the Tagore case, for the purpose of providing rules for the execution, attestation, revocation, revival, interpretation and proof of the wills of Hindus.

In the case of *Alangamanjori Dabee* v. *Sonamoni Dabee.*[1] WILSON, J. considered that in case of wills to which the Hindu Wills Act applies, *viz.*, wills made after the 1st of September, 1870, ss. 99—101 of the Succession Act being embodied in the later Act must be allowed to have their full effect, and he held, that, under these sections, a gift to the unborn children of the testator's three unmarried daughters, to take effect when these children attained their majority, was a valid gift. It was argued, in that case, that the gift was invalid by reason of the last proviso of s. 3 of the Wills Act, which provided that nothing in the Act contained "shall authorize any Hindu, Jaina, Sikh, or Buddhist to create in property any interest which he could not have created before the first day of September, 1870." WILSON, J., however, was of opinion, that to give this effect to s. 3 of the Hindu Wills Act was, wholly or partially, to overrule ss. 99—101 of the Succession Act, as embodied in s. 2 of the Wills Act; and in order to avoid so doing, he considered himself bound to hold that the words 'create any interest,' in the last proviso of s. 3, must be read as referring to the estate or interest which could be given, without reference to the further question to whom it could be given, that being a view which gave a meaning to the words of that section, while at the same time it allowed the sections embodied in s. 2 of the Hindu Wills Act to take effect.

If the decision of WILSON, J., had been upheld by the Court of Appeal the law as laid down in the Tagore case, which, as already mentioned, had not at the date of the passing of the Hindu Wills Act been decided by the Privy Council, would have been materially altered. The decision of *Alangamanjori Dabee* v. *Sonamoni Dabee* was, however, first dissented from by PONTIFEX, J., in the case of *Kallynath Naug Chowdhry* v. *Chunder Nath Naug Chowdhry*,[2] and, subsequently, overruled, on appeal, by GARTH, C. J., and WHITE, J.,[3] who held that a gift by will to Hindus unborn at the time of the death of the testator, whether made prior or subsequently to the passing of the Hindu Wills Act, was void.

Under the exception to s. 99 of the Indian Succession Act, a bequest to the eldest son of C, who had no son at the death of the testator, to be paid to him after the death of B would be a valid gift to a son of C born during B's lifetime and alive at B's death.[4]

Section 101 of the Indian Succession Act is a restriction on the rule as to

[1] 9 C. L. R., 121, (S. C.), I. L. R., 8 Cal., 157.

[2] I. L. R., 8 Cal., 378, (S. C.), 10 C. L. R., 459.

[3] *Alangamanjori Dabee* v. *Sonamoni Dabee*, I. L. R., 8 Cal., 637.

[4] Illustration (c).

perpetuities under English law[1] By that law the vesting of property might be postponed for any number of lives in being and an additional term of 21 years afterwards, and for as many months in addition as are equal to the ordinary period of gestation, should gestation exist;[2] and the additional term of 21 years might be independent or not of the minority of any person to be entitled.[3] Section 101 allows the vesting to be delayed, beyond the lifetime of one or more persons in being, for the period only of the minority of some person in existence at the end of that period; and under s. 3 of the same Act, the period of minority of persons governed by the Act is eighteen years. The addition of an absolute period of 21 years has not been adopted by the section.

It is a rule that, in considering questions of remoteness, the question is not whether the limitation is good in the events which have happened, but whether it was good in its creation, and whether it must necessarily take effect within the limits prescribed by law.[4] In *Dungannon* v. *Smith*, PLATT, B., thus enunciated the rule: "Where a gift is afflicted with the vice of its possibly exceeding the prescribed limit it is at once and altogether void both in law and equity. And even, if in its actual event it should fall greatly within such limit, yet it is still as absolutely void as if the event which would have taken it beyond the limit had occurred." The rule has been held to apply to Hindu Wills. In the case of *Soudamoney Dossee* v. *Jogesh Chundra Dutt*,[5] PONTIFEX, J. said, "In deciding questions of remoteness in England it is an invariable principle of the English Courts to pay regard to possible and not to actual events; and the fact that a gift might include objects too remote or incapable of profiting directly by the testator's bounty is held to be fatal to its validity. This principle is equally applicable to the interpretation of the wills of Hindus."[6] It is of course applicable, in like manner, to all wills to which the Indian Succession Act applies.

The possibility of a woman being past child-bearing is not a possible event for the purpose of determining whether a gift is void for remoteness or not,[7] and

[1] Section 101 of the Indian Succession Act is as follows:—No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

[2] *Jee* v. *Audley*, 1 Cox., 324; Fearne, Cont. Rem., 430.

[3] *Cadell* v. *Palmer*, 1 Cl. and F., 372.

[4] *Jee* v. *Audley*, 1 Cox., 324; *per* LORD KENYON; on *Hodson* v. *Ball*, 14 Sim., 658; *Lett* v. *Randall*, 3 Sm. and Giff., 83; *Dungannon* v. *Smith*, 12 Cl. and F., 546; *Smith* v. *Smith*, L. R., 5, Ch., 342; see *In re Beavan's Trusts*, L. R., 34 Ch. D., 716.

[5] I. L. R., 2 Cal., 268—9

[6] See *Bramamayi Dasi* v. *Jages Chandra Dutt*, 8 B. L. R., 400.

[7] *Jee* v. *Audley*, 1 Cox., 324.

the Court, therefore, will not allow evidence to be given to show that at the date of the will a married woman was past the age of child-bearing for the purpose of showing that children then living were meant, so as to make valid a gift over, which otherwise would be void for remoteness [1]

The following are the illustrations to s. 101 of the Indian Succession Act :— A fund is bequeathed to A for his life; and after his death to B for his life; and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator. Here the son of B, who shall first attain the age of 25, may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B; and the vesting of the fund may thus be delayed beyond the lifetime of A and B, and the minority of the sons of B The bequest after B's death is therefore void.[2] If a fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of B's sons as shall first attain the age of 25 and B dies in the lifetime of the testator, leaving one or more sons, in this case the sons of B are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime and the bequest is valid.[3] Again, if a fund is bequeathed to A for his life, and after his death to B for his life, with a direction that, after B's death, it shall be divided amongst such of B's children as shall attain the age of 18; but that if no child of B shall attain that age, the fund shall go to C. Here, as the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of B, a person living at the testator's decease all, the bequests are valid [4] In the case of a fund bequeathed to trustees for the benefit of the testator's daughters, with a direction that if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18, any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughter whose share it was. All these provisions, therefore, will be valid.[5]

According to Hindu Law gifts in favour of idols are not invalid though the gifts be in their nature perpetual.[6] If, however, a devise to idols be not a

[1] *In re Sayer's Trusts*, L. R , 6 Eq., 319.

[2] Indian Succession Act, s. 101, illustration (*a*).

[3] *Ibid*, illustration (*b*).

[4] *Ibid*, illustration (*c*).

[5] *Ibid*, illustration (*d*).

[6] *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*, 2 B. L. R , O. C., 47 *per* MARKBY, J ; *Tagore* v. *Tagore*, 9 B. L. R , 377 ; *Krishnaramani* v. *Ananda Krishna*, 4 B. L. R , O. C., 231.

real dedication for the worship of the idols, but in effect a settlement in perpetuity for the beneficial interest of the descendants of the testator, it will be void.[1] Under Hindu Law any provision for perpetual descent or for restraining alienation is void,"[2] but, in the case of *Kally Prosono Mitter* v. *Gopee Nath Kur*,[3] it was held, that a recital by the testator of his desire to establish a perpetuity did not invalidate the subsequent trusts of the will, so far as they were otherwise good according to law.[4]

The Indian Succession Act, by s. 102[5], declares that if a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in sections 100 and 101 of the Act, or either of them, the bequest is wholly void.

Now, whether a gift be given by act *inter vivos* or by will, no one can take under the gift who is not in existence and thus capable of taking at the date from which the gift speaks, that is to say, the date of the gift, if *inter vivos*, the death of the testator in the case of a will.[6] Accordingly, if the gift be intended to operate partly in favour of persons living and partly in favour of persons not yet born, the intention of the donor or testator cannot take effect to its full extent. The principle upon which the Courts should act in such cases has given rise to much difficulty, and there appears to be some conflict of authority. Section 102 of the Indian Succession Act adopts the rule in *Leake* v. *Robinson*,[7] but expressly limits it to cases of gifts to a class affected with remotness by s. 101 or to the case of analogous defect mentioned in s. 100 of the Act. In England, as we have seen, a gift is bad which does not vest in some one within a life in being and twenty-one years afterwards, and, under the rule in *Leake* v. *Robinson*, a gift to a class in such terms that the ascertaining of the class and the vesting of the gift are, or may be, deferred beyond the period allowed by the law, is wholly void and cannot be made effectual for such members of the class as might be ascertainable earlier. This rule, it is pointed out by WILSON, J.,[8] is a rider upon the law

[1] *Promotho Dossee* v. *Radhika Prasad Dutt*, 14 B. L. R., 175 ; see *supra*, p. 50.

[2] Mayne, s. 395.

[3] 7 C. L. R., 241.

[4] See *Krishnaramani Dasi* v. *Ananda Krishna Bose*, 4 B. L. R., (O. C.), 231 ; *Chunder-money Dossee* v. *Motilal Mullick*, 5 C. L. R., 496.

[5] This section is embodied in the Hindu Wills Act, but having regard to s. 3 of that Act it is at least doubtful whether ss. 100, 101 or 102 are really applicable to Hindu Wills—See *Ram Lal Sett* v. *Kanai Lal Sett*, I. L. R., 12 Cal., p. 669.

[6] See *Tagore* v. *Tagore*, 9 B. L. R. ; *Soudamoney Dossee* v. *Joyes Chundra Dutt*, I. L. R., 2 Cal., 262 ; *Kherodemoney Dassee* v. *Doorgamoney Dasse*, I. L. R., 8 Cal., 455 ; *Ram Lal Sett* v. *Kanai Lal Sett*, I. L. R., 12 Cal., p. 669 ; *per* WILSON, J.

[7] 2 Merivale, 363.

[8] *Ram Lal Sett* v. *Kanai Lal Sett*, I. L. R., 12 Cal., p. 681.

of remoteness and has never been applied to any case except that of a gift to a class tainted with the vice of remoteness. LORD SELBORNE in *Pearks* v. *Mosley*[1] thus enunciated the rule: "The rule is that the vice of remoteness affects the class as a whole if it may affect an unascertained number of the members." The ground upon which the rule is based is that the donor's intention was to benefit all the members of the class, and that to construe the gift as a gift to such members of the class as are capable of taking, having regard to the rules as to remoteness, would be make a new will for the testator. In *Leake* v. *Robinson*, GRANT, M. R., thus explained the reason for the rule, "I must make a new will for the testator, if I split into portions his general bequest to the class and say that because the rule of law forbids his intention from operating in favour of the whole class I will make his bequests, what he never intended them to be, *viz.*, a series of particular legacies to particular individuals, or what he had as little in contemplation, distinct bequests in each instance to two different classes, namely, grandchildren living at his death and to grandchildren born after his death."[2] So ROLFE, B. in another case said: "The reason why a gift to a class, as children or the like, is void, when it embraces some objects too remote to this: there is no intention to give to any number short of the whole class; and therefore, if the prescribed limit may be transgressed, the whole gift fails, because it does not *necessarily* take effect within the prescribed period."[3]

The first case in which the rule was followed in India was that of *Bramamayi Dasi* v. *Jages Chunder Dutt.*[4] In that case the testator directed his property to be divided into five shares, of which each of his four sons should take one and his two grandsons the other, for life, with a gift over, and a question was raised as to the devolution of the shares of two of his sons, W and S. As to the share of S, there was a clause in the will which declared that "on the death of any son without leaving male issue, his share should go to the survivors of my said sons and my said two grandsons for life and their respective male issue absolutely after their death in the same manner and proportions as hereinbefore described respecting their original shares." It was held that the gift over was void. The gift was construed as a gift "to the surviving sons and the living male issue of the deceased sons as a class, the surviving sons to take for their lives, and the issue of the deceased sons absolutely," and it was pointed out that male issue might include persons born after the death of the testator. On this point NORMAN, J. said, "The gift, therefore, so far as it is a gift to the unborn male issue of the sons and grandsons of the testator must fail. Now it is a well settled rule in construing wills, founded upon excellent reasons, and which has been adopted in the 102nd section of the Indian Succession Act, that

[1] L. R., 5 Ap. Ca., 714

[2] 2 Mer., p. 390.

[3] *Dungannon* v. *Smith*, 12 Cl. and F., p. 575.

[4] 8 B. L. R, 400.

where there is a gift to a class, and some persons constituting such class cannot take, in consequence of the remoteness of the gift or otherwise, the whole must fail. Upon that principle, I think we are bound to say that the gift over on the death of Shib Dass wholly fails."

In the case of *Soudamoney Dassee* v. *Joges Chunder Dutt*,[1] which was upon the same will as the case just referred to, the plaintiff was the widow of the son of W, who had been held in the latter case to have taken his father's share absolutely. The claim was resisted by the defendants, who claimed under the subsequent limitations over, which they contended were valid, and who were willing to admit that the plaintiff's husband became entitled under the original gift. Neither party (it being their interest not to do so) contended that the original gift to the male issue of the testator's son was invalid, as including objects too remote, or, in other words, objects to whom, under the law, the testator could not lawfully make a devise. The objection, however, was taken by PONTIFEX, J., at the hearing, and adopting to the full extent the rule laid down by NORMAN, J., he held that the gift to the plaintiff's husband was bad.

In the next case, that of *Kherodemoney Dossee* v. *Doorgamoney Dossee*,[2] the residue of his estate after several other legacies was given by the testator "to the son lately born to my sister's husband S and to the son or sons that may hereafter be born to him." The gift was held to be wholly void on the principle laid down on the case of *Soudamoney Dossee*.

Considerable doubt, however, has been cast upon the authority of those decisions, none of which, it may be observed, have received the sanction of the final Court of Appeal, by two recent cases.

In the first case[3] which was decided by the Privy Council, one Mata Dyal, the grandfather, his son, Udey Narain and his grandson, Satrujit formed a joint family governed by the Mitakshara Law. Udey was a man of profligate and extravagant habits and in order to protect the estates, Mata Dyal, with the consent of Udey, to whom a sum of Rs. 5,000 was paid, made a conveyance of his estate to Satrujit and declared that "Satrujit and his own brothers, who may be born hereafter, are and will be the permanent and rightful owners." The Privy Council held that the transfer was not void but operated as a valid transfer to Satrujit. In their judgment the Privy Council say:[4] "There remains a question of some difficulty, whether the deed, which contemplates benefits to after-born sons of Udey Narain as well as to Satrujit, can have any operation in his favour. This question, though raised in the plaint, is not dealt with by either of the Lower Courts. It depends entirely

[1] I. L. R. 2 Cal, 212..

[2] I. L. R., 4 Cal., 455, (S. C.), 3 C. L. R., 315.

[3] *Rai Bishen Chand* v. *Asmaida Koer*, L. R., 11 I. A., 164, S. C., I. L. R., 6 All. 560.

[4] L. R., 11 I. A., pp 176—179.

on the view which may be taken of the meaning of the parties to the transaction, for the rule of law, on which the plaintiff relies is, *viz.*, that gifts cannot be made to persons unborn at the time, is well settled.

It is said then that the gift is made to a class, and that inasmuch as some of the class are unable to take, none can take, and certain sections of the Indian Succession Act of 1865 are invoked to give weight to this contention, the Legislature having thought fit to apply these sections to Hindu wills.

Independently, however, of the distinction which may be taken between wills, the operation of which is suspended during the teststor's life, and deeds which operate immediately, especially such deeds as confer a present interest upon a present person, the sections cited have no bearing on such a gift as that under consideration. Section 102 lays down the rule that a bequest inoperative as to some of a class shall be wholly void, not in all cases, but only when the bequest offends against the rules contained in sections 100 and 101. And the gift under consideration does not fall within either of these two sections It may be that illustration (*b*) to section 102 imports into India an English rule of construction which usually defeats the intention of the testator. But whatever force the illustration may have (and it seems out of place as attached to a section intended, not to define the word "class," but only to establish a special incident of gifts to classes), it is not made applicable beyond the two cases contemplated by sections 100 and 101.

Assuming that the deed is intended to express a gift to the brothers of Satrujit, which cannot take effect as such, what is the whole scheme of the parties? We find them bent on saving the ancestral estate from the consequences of the continued extravagance of one of its members. The plan they adopt, probably the only plan open to them except a complete partition, is a transfer by the head of the family, with the consent of his son, to the lower generation. The only member of that generation was the grandson Satrujit. He therefore is made to take by name and immediately, and the possession and ownership are transferred to him. Is then the gift undisputably designed for him wholly to fail because the parties supposed that they could join with him possible after born sons, who, if any had happened to be born, could not legally claim under a gift? Is Udey Narain, whose interests were bought out for valuable consideration to re-enter upon his son, in whose favour they were bought out? No doubt that on the present assumption some portion of the intention must fail, but that is no reason why the whole should fail. The paramount intention was to get rid of Udey Narain by passing the property to his sons. That intention is much more readily effectuated by giving the property to Satrujit, the only then son of Udey Narain, than by holding that the deed and all that followed upon it, the mutation of names, the possession and management of Asmaida did not operate any change at all.

Cases are not rare in which a Court of Construction finding that the whole

plan of a donor of property cannot be carried into effect, will yet give effect to part of it rather than hold that it shall fail entirely. In the present case, there is every reason for holding that, if Satrujit's possible brothers are not able to take by virtue of the gift, he shall take the whole. He is there, present and able to receive the gift. He is an individual designated in the deed. If the deed stood alone, it is a question in each case whether a designated person who is coupled with a class described in general terms is merged into that class or not. But the deed does not stand alone. It is followed by actions of a kind which even without a deed may work a transfer of property in India. Satrujit is entered in the Collector's books as the sole possessor of the property, and his guardian takes possession, first in his name and afterwards as his successor. Their Lordships hold that the circumstance that the parties wished to do something beyond their legal power, and that they have used unskilful language in the deed of gift, ought not to invalidate that important part of their plan which is consistent with one construction of the deed, and is clearly proved from the transfer of the property in fact.

But their Lordships conceive that it is not necessary to view this transaction as though it were to be determined by rules of construction drawn from English law and applicable to English deeds of gifts. The High Court viewed it in the light of a partition. It cannot be strictly a partition, for according to the Mitakshara[1] there can be no partition directly between grandfather and grandson, while the father is alive. But it is a family arrangement partaking so far of the nature of a partition that Udey Narain receives a portion and is thenceforth totally excluded and *quoad ultra* Mata Dyal surrenders his interest to his grandson, who on a complete partition among the whole family would be entitled to one-fourth. Now in such an arrangement it would be quite consistent with Hindu ideas of ancestral property to express a desire that the whole generation into which the property was transferred should benefit by it. Indeed in the case of a partition between father and sons it is laid down in the books that if a son born after the partition of ancestral estate does not out of the residue of his father's estate get a share equal to what his brothers had obtained, the other brothers must contribute to a share out of their portions. This rule is to be found in the Dayabhaga,[2] which is a Bengal authority, but it refers to Vishnu and Yajnyavalkya, authorities on which the Mitakshara is founded. Indeed, the principle of the joint family is not less closely, but more closely, insisted on by the Benares school than by the Bengal school of law. But their Lordships are not now affirming the law on this point, nor are they deciding or prejudicing any question which may arise between Satrujit's heirs, on the one hand, and his brothers, if any should be born, on the other. They are only shewing that the

[1] Cap. i, sect. 5, verse 3.

[2] Cap. vii, ss. 10, 11 and 12.

notions present to the mind of the head of a joint Hindu family who is making a family arrangement are something very different from the notions present to the mind of an English testator when he makes a gift to a class."

That case was followed by the case of *Ramlall Sett* v. *Kanailal Sett*,[1] which also turned, not on the construction of a will, but of a deed. There one Radhakristo Sett executed a deed by which he gave certain property to the defendants Ramlall Sett and Shamlall Sett, the two existing sons of his son Madhub, and to the sons to be born to him in future, and he declared that the two existing sons and their uterine brothers who should be born in future should divide the same amongst them in equal shares. The deed further provided that two existing brothers should take possession of the property and have their names registered in the Collector's office, but that the rights and interests of the uterine brothers who should be born in future should in no way be extinguished by reason of the existing brothers obtaining possession. Following the authority of the Privy Council in the case of *Rai Bishen Chand* v. *Asmaida Koer*,[2] the Court (GARTH, C. J. and WILSON, J) held that there was a good gift to the two living grandsons, but that the gift to the after-born brothers was ineffectual. WILSON, J. discussed all the authorities on the question at great length, and, after expressing an opinion that the principles of construction adopted by the Privy Council were inconsistent with those acted upon in the cases of *Soudamoney* and *Kherodemoney*, said : " For these reasons I should be prepared, if necessary, to dissent wholly from the doctrine laid down in these cases and to hold, as the general rule, that where there is a gift to a class some of whom are, or may be incapacitated from taking, because not born at the date of the gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking. I think the late decision of the Privy Council is a direct authority for so holding, where the intention, is, as I think it was in this case, to give a present gift to those of the class who are capable of taking."[3]

It seems to be settled that by reason of the saving clause in s 3 of the Hindu Wills Act that neither s 100 or s 101 of the Indian Succession Act, though embodied in the Hindu Wills Act, has any application to Hindu wills,[4] and WILSON, J. expressed an opinion that it would follow that s. 102 also had none either.[5]

[1] I L R , 12 Cal., 663.

[2] L. R., 11 J. A. 164, (S. C.), I. L. R., 6 All., 560.

[3] I. L R , 12 Cal , 685.

[4] *Manyumanjori Dabee* v. *Sonamoni Dabee*, I. L. R., 8 Cal , 637.

[5] *Ram Lal Sett* v *Kanai Lal Sett*, I. L. R., 12 Cal., p 669 ; see s 6 of the Hindu Wills Act.

The rules as to remoteness in England were thus conveniently stated by LORD HATHERLY in *Cattlin* v. *Brown*.[1] "The first rule" he said, "is that an executory devise is bad unless it be clear at the death of the testator that it must, of necessity, vest in some one, if at all, within a life in being and twenty-one years afterwards;" citing *Dungannon* v. *Smith*.[2] (2) "The second rule is, that you must ascertain the objects of the testator's bounty by construing his will without any reference to the rules of law which prohibit remote limitations, and having, apart from any consideration of the effect of those rules in supporting or destroying the claim, arrived at the true construction of the will, you are then to apply the rules of law as to perpetuities to the object so ascertained." (3) "Thirdly, if the devise be to a single person answering a given description, and any one member of the series intended to take may, by possibility, be a person excluded by the rule as to remoteness, then no person whatever can take, because the testator has expressed his intention to include all, and not to give to one, excluding others;" citing *Proctor* v. *The Bishop of Bath and Wells*.[3] (4) "The fourth rule is, that where the devise is to a class of persons answering a given description, and any member of that class may possibly have to be ascertained at a period exceeding the limits allowed by law, the same consequence follows as in the preceding rule; and, for the same reason, you cannot give the whole property to those who are in fact ascertained within the period and might have taken if the gift had been to them *nominatim*, because they were intended to take in shares to be regulated in amount, augmented or diminished according to the number of the other members of the class, and not to take exclusively of those other members. Of this rule, the cases of *Jee* v. *Audley*,[4] *Leake* v. *Robinson*[5] and *Gooch* v. *Gooch*,[6] are illustrations." (5) "The fifth and last rule, to which I need advert, is this,—that, where there is a gift or devise of a given sum of money, or property to each member of a class, and the gift to each is wholly independent of the same or similar gift to every other member of the class, and cannot be augmented or diminished according to the number of the other members, then the gift may be good as to those within the limits allowed by law. This was settled in the case of *Storrs* v. *Benbow*.[7]

A bequest of a principal fund to be divided equally amongst a class (the children of the testator's daughter), with a gift over in case of any of them dying under *twenty-four* without leaving issue, was held not to be void as too

[1] 11 Hare, 372.
[2] 12 Cl. and F., 546, 570.
[3] 2 H. B., 358.
[4] 1 Cox., 324.
[5] 2 Mer. 363.
[6] 14 Beav., 565.
[7] 2 M. and K., 46.

remote, but to give a present vested interest liable to be divested in case of death under 24 without leaving issue.[1]

In the case of *Maseyk* v. *Fergusson*,[2] the testator gave his residuary estate to trustees upon trust "to invest and pay, transfer or divide the same unto, between, or among the children of my brothers A and B respectively, to be paid, transferred to, and divided among them in the proportions and at the times hereinafter mentioned,—that is to say, the share of each and every son of my said two brothers shall be double that of each and every daughter, and the share of each son shall be paid to him or them respectively upon his or their attaining the age of 21 years, and the share of each daughter to be paid to her or them on her or their respectively attaining that age, or previously marrying, with benefit of survivorship among all the said sons and daughters." The testator left him surviving a sister and his brothers A and B, who both died before the eldest of the testator's nephews or nieces attained the age of 21 or married. The widow and executrix of A instituted a suit to have it declared that the above bequest was void under sections 101 and 102 of the Succession Act, and that she, as executrix of A, was entitled to one-third of the estate and the accumulations thereon. The Court (PONTIFEX, J.), however, held, that the bequests were valid; that the legatees took vested interests, subject to be divested on death before the contingencies mentioned in the will happened, and that the period of distribution alone was postponed. In *Shum* v. *Hobbs*,[3] which was distinguished by PONTIFEX, J., from *Maseyk* v. *Fergusson*, the testatrix gave a share of a residue "upon trust for her son for life, and after his death upon trust to transfer and pay the capital of the said funds unto and amongst the children, if only one, or both, or all the children, if more than one, of her said son," in manner thereinafter mentioned. Then followed a direction making the gift to her son void if he aliened or encumbered it, and giving over the dividends to the parties entitled in remainder. Then followed a declaration that the shares should be payable at 21, or marriage. KINDERSLEY, V. C., held, looking at the context of the will, that this was not a substantive gift with a simple direction to pay, but one general direction to pay at 21 or marriage and that the interests of her son's children were not vested.[4]

There are cases in which the general rule in *Leake* v. *Robinson*,[5] has been made to give way to particular indications of a contrary intention. Thus, in

[1] *Bland* v. *Williams*, 3 M. and K., 411 · see *Tatham* v. *Vernon*, 22 Beav., 604; and *Dames* v. *Fisher*, 5 Beav., 201.

[2] 1. L. R., 4 Cal., 304.

[3] 3 Dr., 93.

[4] See *Williams* v. *Clark*, 4 DeG. and S., 472 Intestate and Testamentary Succession in India, p. 130

[5] 2 Mer., 363.

Bree v. *Perfect*,[1] there was a gift, upon trust to pay the interest to F. B. for life, and at her death to be equally divided "among such of her children as shall be living at the time of her death, as they respectively attain twenty-one," but if she should "die without leaving issue," over. The Court, on the ground of the limitation over, held that the principal vested in the children living at the death of F. B. That case was followed by LORD HATHERLY, in *Ingram* v. *Suckling*[2] and by KAY, J. in *In re Beavan's Trusts*.[3]

In the case of *In re Bedson's Trusts*,[4] some difficulty, by reason of a life estate being made terminable on bankruptcy, arose in dealing with a gift to a class. There the testator gave a fund to trustees, upon trust to pay the income to his son, during his life, and after his death, to pay and divide the fund equally among all the children which the son might have, as, and when they should attain the age of twenty-one, and if the son should have no child who should attain the age of twenty-one, the fund was to sink into the residue of the testator's estate, and the will contained a proviso that, if the son should be adjudicated bankrupt, the fund and the income thereof should thenceforth immediately go, and be payable or applicable to, or for the benefit of the child or children of the son "in the same manner as if he were naturally dead," or, in default of such child or children, should sink into the residue. After the death of the testator the son was adjudicated a bankrupt. At the date of his adjudication he had two children but other children were born to him afterwards. There was, in the first instance, a gift to a class of children subject to their attaining the age of twenty-one and that class was to be ascertained at the death of the father, but a question was raised as to whether there was any intention in the will to give the fund in the event of bankruptcy to a different class from that which would have taken it under the previous gift. The Court held that there was no intention on the part of the testator of preferring the elder to the younger grandchildren, and, accordingly, that the children born after the adjudication were entitled to share in the fund subject to the contingency of their attaining twenty-one.

Section 103[5] of the Indian Succession Act declares that where a bequest is void by reason of the rules laid down in sections 100, 101 and 102, any bequest contained in the same will and intended to take effect after or upon failure of such prior bequest, is void. In England, all limitations ulterior and expectant upon limitations which are void for remoteness, are themselves void. Thus, if there is a limitation to the first or other son of A (who has no son) at twenty-three, and if he shall have no such

[1] 1 Coll., 128.

[2] 7 W. R, Eng., 386.

[3] L. R., 34 Ch. D., 716.

[4] L. R., 28 Ch. D., 523.

[5] This section is embodied in the Hindu Wills Act.

son, over, both limitations will be void[1] The reason that the gift over is void is explained by LORD ST. LEONARDS in *Moneypenny* v *Dering*,[2] as being dependent upon the supposed intention of the testator Speaking of the gift over which was held void in the case of *Beard* v. *Westcott*,[3] he said, "It was void, not because it was not within in the line of perpetuity, but on the ground that the limitation over was never intended by the testator to take effect, unless the persons whom he intended to take under the previous limitation would, if they had been alive, have been capable of enjoying the estate; and that he did not intend that the estate should wait for persons to take in a given event, where the person to take was actually in existence but could not take" On the other hand, if there be two alternative limitations one branch of which is too remote and the other of which is capable of taking effect, the Court will disregard the unvalid limitation and give effect to that which is legal[4]

By s. 104 of the Indian Succession Act, which does not, however, apply to Hindus, a direction to accumulate the income arising from any property is void, except where the property is immoveable, or where the accumulation is directed to be made from the death of the testator, in which cases the direction is valid in respect only of the income arising from the property within one year next following the testator's death; and at the end of the year such property and income are to be disposed of, respectively; as if the period. during which the accumulation had been directed to be made, had elapsed This is a considerable restriction upon the English law as to accumulation. Formerly, in England, the power of preventing the *enjoyment* of property by directing an accumulation of the annual proceeds was confined within the limits established against perpetuities, *viz.*, for a life or lives in being and twenty-one years This power was, however, further restricted by Statute 39 and 40 Geo III c. 98, in consequence of the will of a Mr. Thellusson, who directed the income of his property to be accumulated during the lives of all his children, grandchildren and great-grandchildren, *who were living at the time of his death*, for the benefit of some future descendants who might be living at the decease of the survivor,[5] thus keeping strictly within the rule which allowed any number of existing lives to be taken as the period for an executory interest.[6] By the Statute just mentioned, the period of accumulation under wills was

[1] *Proctor* v. *Bishop of Bath and Wells*, 2 H B, 258; *Cambridge* v *Rous*, 8 Ves, 24; *Beard* v. *Westcott*, 573 and Ald, 801; *Thatcher's Trusts*, 26 Beav 365.

[2] 2 DeG. M. and G, 182

[3] 15 B. and Ald., 801.

[4] *Longhead* v. *Phelps*, 2 W. B. 704; *Evers* v. *Challis*, 7 H. L Ca, 581; *Watson* v *Young*, 28 Ch D., 436; *Re Thatcher's Trusts*, 26 Beav., 365

[5] *Thellusson* v *Woodford*, 4 Ves, 227

[6] Williams' Real Property, 308, 10th Edn

limited to the term of twenty-one years from the death of the testator, or during the minority or respective minorities of any person or persons who should be living or *en ventre sa mere* at the time of the death of the testator, or during the minority or minorities, or respective minorities of any person or persons who, under the will or codicil, would, for the time being, if of full age, be entitled to the income directed to be accumulated.[1] But, by s. 2, exceptions were made for accumulations for the payment of debts of the testator or other persons, and also for the raising of portions for the children of the testator or of any other person taking an interest under the will. This provision for payment of debts excepted by the Statute is not confined to debts existing at the date of the will or at the death of the testator, but applies also to future debts.[2] The direction for the payment of debts must, however, be *bonâ fide* and not merely colorable for the purpose of evading the Act.[3] In the case of portions, it has been held that if the accumulation is for a class or children, some of whose parents take no interest under the will, the exception does not apply.[4] In England, it is not necessary that there should be an express direction to accumulate, but if an accumulation necessarily takes place by reason of the form in which the property is given, the case falls within the Act.[5]

The Indian Succession Act allows accummulations only where the property is immoveable, or where the accummulation is directed to be made from the death of the testator, and the direction is valid in respect only of the income arising from the property during the next year following. In England, in case of immoveable property, where accumulations are directed to be made from the death of the testator, the direction, if within the limits of perpetuity, will not be void if it exceed the period allowed, but will be valid to the extent of the time allowed by that Act.[6]

The period of twenty-one years from the death of the testator allowed by the English Statute, it has been held, is to be calculated exclusive of the day of the testator's death,[7] and it would seem that the period of one year under the Indian Act would be similarly computed.

As already stated, s. 104 of the Indian Succession Act does not apply to

[1] Intestate and Testamentary Succession in India, p. 133.

[2] *Varlo* v. *Faden*, 27 Beav., 255.

[3] *Ibid.* p. 265; see *Mathews* v. *Keble*, L. R., 3 Ch. A., 691.

[4] *Eyre* v. *Marsden*, 2 Keen., 564.

[5] *Tench* v. *Cheese*, 6 DeG. M. and G., 453; *Wade-Gery* v. *Handley*, L. R., 3 Ch. D., 374; *McDonald* v. *Bryce*, 2 Keen., 276; *Bective (Countess of)* v. *Hodgson*, 10 H. L C., 656, 671.

[6] *R. Lady Rosslyn's Trusts*, 16 Sim., 391; *Southampton, (Lord)* v. *Hertford (M. of)*, 2 V, and B., 54; *Scarisbrick* v. *Skelmersdale*, 17 Sim., 187; *Gorst* v. *Lowndes*, 11 Sim., 434.

[7] *Webb* v. *Webb*, 2 Beav., 493; *Gorst* v. *Lowndes*, 11 Sim., 434; *Lester* v. *Garland*, 15 Ves., 248.

Hindus, and according to Hindu Law many wills directing accumulations have been held to be invalid In the case of *Kumara Asima Krishna Deb* v *Kumara Kumara Krishna Deb*,[1] the will attempted to create a trust for the accumulation for 99 years of the surplus income of the estate of the testator in the purchase of zemandaries, and no disposition being made of the beneficial interest in the zemindaries to be purchased, the trust was held to be void In the case of *Krishnaramani Dasi* v. *Ananda Krishna Bose*[2] a direction in the will that a certain fund was to accumulate until it should amount to three lakhs of rupees, and then to be divided, and that accumulation should then begin again as before, was held to be void.

Section 105 of the Indian Succession Act puts a restriction upon the power of testators to bequeath property to religious or charitable uses. It declares that no man having a nephew or neice, or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed, not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons The following bequests, by way of illustration, it declares to be void, if made by a testator having a relative nearer than a nephew or neice and by a will not in accordance with the section, *viz.*, for the relief of poor people, maintenance of sick soldiers, the erection or support of a hospital, the education and preferment of orphans, the support of scholars, the erection or support of a bridge, the making of roads, the erection or support of a church, the repairs of a church, the benefit of ministers of religion and the formation or support of a public garden.

The object of the section is to prohibit death-bed bequests to religious or charitable uses by persons having near relations. Having regard to the table of consanguinity fixed by s. 24 of the Act, such death-bed bequests cannot be made by persons having any of the following relations: father, mother, son, daughter, grandfather, grandmother, grandson, granddaughter, brother, sister, nephew or neice, except under the conditions imposed.

"Charity" has been defined to be a general public use.[3] The Succession Act gives no definition, but the illustrations to s 105 show that the term is intended by the Legistature to have a very wide signification. In England, the preamble to the Statute 43 Eliz. c. 4 is generally referred to in order to ascertain what are charitable uses, but although that preamble contains an enumeration of objects declared to be charitable, that enumeration has not been considered

[1] 2 B. L. R., O. C. J., 11.

[2] 4 B. L. R., O. C., J., 231; *Shookmoy Chundra Das* v. *Monoharri Dasi*, I. L. R., 11 Cal., 684; see *supra*, pp. 51, 52.

[3] *Jones* v. *Williams*, Amb., 651.

to be exhaustive, and many objects which are not comprised in it have been held to be charitable as being within the spirit of the Statute.

The following are the various charitable objects enumerated by Statute 43 Eliz c 4: relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning, free schools, and scholars in Universities; repair of bridges, ports, havens, causeways, churches, seabanks and highways; education or preferment of orphans; towards relief, stock, or maintenance for houses of correction, marriages of poor maids, relief or redemption of prisoners or captives, aid for ease of poor inhabitants in payment of certain taxes. Among gifts for objects not comprised in the above enumeration, but which have been held to be charitable are the following, *viz.*, gifts for widows and orphans, or the poor of a place,[1] for building or endowing a hospital,[2] for the erection of waterworks,[3] towards payment of the national debt,[4] for the encouragement of good servants,[5] for deserving literary men, who have been unsuccessful[6] and for educational purposes.[7] A gift in favor of the parish or of the parishioners has also been held to be charitable.[8]

Bequests, to be valid as charitable bequests, must be for the benefit of the public generally, or of some section of the public.[9] Accordingly, a bequest to be given in private charity,[10] or for the erection of a private tomb or monument,[11] or for the benefit of a private company,[12] are void, if offending against the rule of perpetuities, and invalid as charitable bequests.

In England, by the Statute of Mortmain,[13] devises of real estate or personal property, savouring, as it is said, of the realty, for charitable purposes, are prohibited; but it has been held that that Statute is not operative in India.[14]

[1] *Powell* v. *Attorney-General*, 3 Mer, 48, *Thompson* v. *Corby*, 27 Beav., 649

[2] *Pelham* v. *Anderson*, 2 Ed., 296.

[3] *Jones* v. *Williams*, Amb., 651.

[4] *Newland* v. *Attorney-General*, 3 Mer., 684

[5] *Loscombe* v. *Winteringham*, 13 Beav., 87.

[6] *Thompson* v. *Thompson*, 1 Col., 395; see futher, cases cited in note to *Loscombe* v. *Winteringham*, 13 Beav., 89.

[7] *Malchus* v. *Broughton*, I. L. R., 11 Cal., 591, I. L. R., 13 Cal., 193; See *Wicker* v. *Hume*, 7 H. L. C., 124; *Beaumont* v. *Oliviera*, L R., 4 Ch., 309.

[8] *Attorney-General* v. *Welston*, L. R., 20 Eq., 348.

[9] *Attorney-General* v. *Aspinall*, 2 My. and C., 622; *British Museum* v. *White*, 2 S. and S., 596, See *Lunji* v. *Bapuji*, I. L. R., 11 Bom., 451; *Lewin on Trusts*, p. 106, 8th Edn.

[10] *Ommanney* v. *Butcher*, 1 Tur. and. R., 260.

[11] *In the goods of Richard*, 31 Beav., 244; *Fowler* v. *Fowler*, 33 Beav., 616; *Hunter* v. *Bullock*, L. R., 14 Eq., 45.

[12] *Attorney-General* v. *Haberdashers' Co.*, 1 M. and K., 420, *Cocks* v. *Manners*, L. R., 12 Eq., 574.

[13] 9 Geo., III, c. 36.

[14] *Mayor of Lyons* v. *E. I. Company*, 1 Moore's I. A., 175.

Accordingly, the Courts here will carry out a charitable trust in the nature of of a perpetuity when the subject is immoveable property, just as it would, if it had been merely personal property.[1] In the case of *Broughton* v. *Mercer*,[2] the testator, an Englishman by birth and domicile, devised certain immoveable property in India to trustees in perpetuity, in trust for the support of hospitals in the North-Western Provinces. The Court held that the devise was a valid devise as being a charitable trust within the scope of 43 Eliz., c 4.[3]

Bequests for such objects of benevolence and liberality,[4] or for such, charitable or benevolent purpose as the executors might agree upon,[5] for such benevolent purposes as the trustees in their integrity might agree upon[6] and for acts of hospitality and charity[7] have been held not to be valid charitable gifts. It has been held that a friendly society is not a charitable institution and that a gift to such a society is not a gift to charity.[8]

Bequests for the propagation of religious doctrines of various sects,[9] for ministers of religion,[10] for the repairs of a church[11] have been held to be valid.

The following Statutes in England have relation to religious uses:—23 Hen VIII, c. 10; 1 Ed. VI, c. 14; 1 W. & M., c. 15; 55 Geo. III, c. 160; 2 & 3 Will. IV, c. 115, s. 1; and 8 & 9 Vic., c. 59.

Charities, it is said, are so highly favoured in law that gifts to charities have always received a more liberal construction than the law will allow in case of gifts to individuals.[12] In the case of charitable bequests, where from the objects being uncertain, or the persons who are to take not being *in esse*, or the bequest being incapable of being carried into exact execution, or, for other like causes, a literal execution becomes inexpedient or impracticable, the Court will carry out the will as nearly as it can according to the original purposes, or, as the technical expression is, *cy prés*.[13]

[1] See *Broughton* v. *Mercer*, 14 B. L. R., 448

[2] 14 B. L. R., 448.

[3] Intestate and Testamentary Succession in India, p 135-6

[4] *Morice* v. *Bishop of Durham*, 10 Ves., 522.

[5] *In re Jarman's Estate*, L. R., 8 Ch. D., 584.

[6] *James* v. *Allen*, 3 Mer., 17; see *Ellis* v. *Selby*, 1 My. and Cr., 386

[7] *In re Hewett*, 49 L. T., N. S., 587

[8] *In re Clark's Trust*, L. R., 1 Ch D., 497; see *In re Dutton*, L. R., 4 Exch Div., 54.

[9] *Shrewsburry* v. *Hornby*, 5 Hare, 406

[10] *Attorney-General* v. *Lawes*, 8 Hare, 32.

[11] *Hore* v. *Obsorne*, L. R., 1 Eq., 585. See 43 Eliz. c. 4.

[12] *Mills* v *Farmer*, 1 Mer., 55, 96; *Moggridge* v. *Thackwell*, 7 Ves., 36, 2 Story, Eq. Jur, 1165.

[13] 2 Story, Eq., Jur. 1169; *Gower* v. *Mainwarring*, 2 Ves. Sen., 87-89, *per* LORD HARDWICKE.

Where a charitable bequest is made to an institution which does not exist, the Court will carry out the general charitable intent of the testator by devoting the subject of the bequest to other charities. Thus, in *Longbottom* v. *Salour*,[1] where the testatrix bequeathed the interest of a fund to the "Calcutta Armenian Orphans' College for the relief and enjoyment of the poor families, widows, orphans, schools of the Armenian nation," and there was no institution answering the description, the Court directed the interest of the funds to be paid to two other institutions, the Church of St. Nazareth, which distributed money to the poor families, widows and orphans of the Armenian community, and the Armenian Philanthropic Academy, which educated gratuitously the poor and orphans of the same community.[2]

If the objects of a charitable bequest cease to exist, the Court will sanction a new scheme for the proposal of the fund.[3] In the case of the *Atty.-Gen.* v. *Oglander*,[4] LORD THURLOW is reported to have said that, although, where a charity is so given that there can be no objects, the Court will order a different scheme to be laid before it, yet, if the objects may exist, though they do not at present, it will not make such an order. In another case,[5] where the original foundation was for the reception of lepers and it was found that that disease had become almost extinct in England, the Court directed a scheme to be prepared for the future application of the rents etc. of the estates, and afterwards confirmed the report of the Master, who had approved of a scheme for the application of the revenues for the benefit of a general infirmary existent in the same county, but reserved a preference for the admisson of all leprous patients who might offer themselves.

Where a charitable fund has, on the object, for which it was provided, becoming incapable of being carried out, been applied *cy près* to an object in itself beneficial, the Court will not subsequently change the application even to a purpose identical with its original object, unless it is satisfied that the proposed application will be as beneficial as the existing one.[6]

[1] *Attorney-General* v. *Hicks*, 3 Bro. C. C., 166, note.

[2] 1 Mad, H. C. R., 429.

[3] For cases in which the Court will execute the general intent of the testator, see *Attorney-General* v. *Ironmongers' Co*, 2 My. and K., 576; *Longford* v. *Gowland*, 3 Giff., 617; *Parfitt* v. *Hember*, L. R., 4 Eq., 443; *New* v. *Bonaker*, *Ibid*, 655; *Dawson* v. *Small*, L. R., 18 Eq., 114; *In re Williams*, L. R., 5 Ch. D., 735. See also *Mayor of Lyons* v. *Advocate-General of Bengal*, I. L. R., 1 Cal., P. C., 303; *Malchus* v. *Broughton*, I. L. R., 11 Cal., 591, I. L. R., 13 Cal., 193; I. L. R., 1 Cal. (P. C.) 303.

[4] *Attorney-General* v. *City of London*, 1 Ves., 243; *Mayor of Lyons* v. *Advocate-General of Bengal*, L. R., 1 App., Ca. 91.

[5] 3 Bro. C. C., 166.

[6] *Attorney-General* v. *Stewart*, L. R., 14 Eq., 17; see *Attorney-General* v. *Bishop of Worcester*, 9 Hare, 328.

The rule of English law which prohibits bequests of money to superstitious ness,[1] does not apply to India.[2] Thus in *Andrews* v. *Joakim*,[3] and *Das Mences* v. *Cones*,[4] bequests for the performance of masses in Calcutta were held to be valid.

Among Hindus, to whom s. 105 of the Indian Succession Act has not been made to apply, grants to superstitious uses have been repeatedly enforced by the Privy Council.[5]

[1] See *In re Fleetwood*; *Sidgreaves* v. *Brewer*, L. R, 15 Ch. D., 594; see 1 Ed, VI c 14, 23 Henry VIII, C. 10; *Cary* v. *Abbot*, 7 Ves, 490

[2] *Judah* v. *Judah*, 5 B. L. R., 433.

[3] 2 B. L. R., (P. C.), 148.

2 Hyde, 65.

[5] *Ramtonoo Mullick* v. *Ramgopal Mullick*, 1 Kn. App, 245; *Jewan Doss* v *Shah Kubeer-ooddeen*, 2 Moo., I. A., 390; *Juggut Mohini Dossee* v. *Sokheemonney*, 14 M, I. A, 289.

LECTURE VIII.

VESTING OF LEGACIES—CONDITIONAL BEQUESTS—BEQUESTS WITH DIRECTIONS AS TO ENJOYMENT OR WITH BURDENS—BEQUESTS TO EXECUTORS.

Rules in England as to vesting—Vesting of legacies in general terms—Bequests vested in interest—contingent—conditional—or subject to be divested—Vesting, where payment or possession is postponed—Gift over divesting legacy need not be indefeasible—"Vested" "Payable"—"Due and payable"—Acceleration, on life interest becoming void—Contingent bequests—Cases where gift of interest is not sufficient to vest contingent bequests—Discretion to apply whole or part of interest—Distinction between contingent bequests and bequests vested in interest subject to being divested—Words indicating conditions or contingencies—Right to income before happening of contingency—Gifts to a class on happening of contingency—Gifts to a contingent class—Gift to a class who attain twenty-one—Gift to class at twenty-one—Contingency of attaining twenty-one not imported into gift to single child—Vesting not postponed by direction as to payment, if there is a a clear gift—Vesting, where legacy is contingent upon a specified uncertain event—Bequest contingent upon specified uncertain event, no time being mentioned for its occurrence—Words referring to death coupled with contingency—Death of object of prior gift in testator's lifetime—Gift to "A and, if he shall die," over—Rules in *Edwards* v. *Edwards*—Gifts over before actual receipt of legacy—Bequest to such of certain persons as shall be surviving at some period not specified—"Survivor" and "Survive"—Presumption as to survivorship—Conditional bequests—Distinction between conditions precedent and subsequent—Bequest on impossible condition—upon illegal or immoral condition—In England, conditions precedent to be literally performed—In India, substantial fulfilment of condition precedent sufficient—Conditions as to consent to marriage—Conditions as to residence—in restraint of marriage—Bequest on failure of prior bequest—Conditions subsequent—Bequest over upon the happening or not happening of a specified event, condition must be strictly fulfilled—Original bequest not affected by invalid ulterior bequest—Conditions *in terrorem*—Bequest conditioned that it shall cease to have effect in case a specified uncertain event shall happen or not happen—Conditions postponed or rendered impossible by legatees—Performance of conditions, precedent or subsequent—Time allowed for performance of conditions in case of fraud—Bequests with directions as to application or enjoyment—where bequest is absolute—or bequest is not absolute—Bequest of fund for certain purposes some of which cannot be fulfilled—Repugnant conditions—Restraint on alienation—Precatory Trusts—Words too indefinite to create Trusts—Onerous bequests—Bequests to executors.

In England, as we have seen, the law is always in favour of early vesting.[1] This was especially the case with regard to real property, the vesting of which

[1] See *Duffield* v. *Duffield*, 3 Bligh., N. S., 260.

was governed by the Common Law. As to the vesting of legacies of personal property, the rules in England have been to a great extent borrowed from the Canon law.[1] The provisions of the Indian Succession Act as to vesting seem to incline towards the English Common Law.

As a will speaks from the death of the testator, it follows that, under a bequest in general terms without specifying the time when it is to be paid or made over, a legatee takes an immediately vested interest.[2] Such a bequest is said to be vested in possession, *i. e.*, there is a present right to the immediate possession or enjoyment of it. Estates or interests in property, however, which are not vested in possession may be (1) vested in interest but not in possession, as where there is a present indefeasible right to the future possession or enjoyment, as in the case of a devise to A for life, remainder to B, the bequest to B is vested, and, in the event of his death, transmissible to his representatives, (2) contingent, as in the case of a legacy to D, in case A, B and C shall all die under the age of 18, or (3) conditional, as where a legacy is bequeathed to A, on condition that he marries with consent of B. A legacy may also be vested but subject to be divested, as where there is a present right to the legacy, defeasible on the happening of a particular event, *e. g.*, where there is a gift to an infant with remainder over in the event of his dying under twenty-one, in which case the infant has a vested interest subject to be divested on his death under age.[3]

The following is the rule under the Indian Succession Act,[4] where payment or possession is postponed: "Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives, if he dies before that time and without having received the legacy. And in such cases the legacy is from the testator's death said to be vested in interest." To this rule is added this explanation:—"An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision, whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that if a particular event shall happen the legacy shall go over to another person."

[1] See *Hanson* v *Hanson*, 6 Ves., 239

[2] Indian Succession Act, s. 91, which is applicable to Hindus etc. under the Hindu Wills Act.

[3] See *O'Mahoney* v. *Burdett*, L. R., 7 H. L., 388, and illustration (*f*), Indian Succession Act, s. 106.

[4] S 106 This section is applicable to Hindus etc under the Hindu Wills Act.

Among Hindus where there is a present gift, the fact that the estate is subject to partial trusts or charges will not postpone the vesting in possession.[1]

In the case of *Bachman* v. *Bachman*,[2] there was a direction to trustees to sell and convert into money such part of the testator's personal estate as should not consist of money, and to divide the same and the ready money which might belong to his estate among the several persons named in a schedule to the will, and to pay the same in the shares therein mentioned, as, and when, they should attain the age of twenty-one in the case of males, or, in the case of females, when they should respectively attain that age or marry. The testator also directed that in the event of any of such persons dying in his lifetime, or at any time thereafter "prior to the said division" leaving lawful issue, such issue should be entitled to the share which their deceased parent would have taken. One of the legatees who had attained the age of twenty-one at the date of the testator's death died five months after him, before payment of the legacy, and left lawful issue, and the Court held that the legacy vested in interest in the legatee at the testator's death, but that, upon his having died prior to the division[3] of the estate, it became divested.

Where there is a gift over divesting a bequest, it is not necessary that it should be indefeasible. Thus, under a devise to A, and if he die without issue, to B, if A die without issue, the gift to B will take effect, and if he should predecease A, his interest will devolve upon his heirs.[4] So, if a fund is bequeathed to A, B, and C in equal shares, to be paid to them on their attaining the age of 18 respectively, with a proviso that, if all of them die under the age of 18, the legacy shall devolve upon D, the shares, on the death of the testator, vest in interest in A, B, and C, subject to be divested in case A, B, and C all die under 18, and upon the death of any of them (except the last survivor) under the age of 18, his vested interest passes, so subject, to his representatives.[5] A devise to A, provided she lives to attain twenty-one, was held to be vested subject to being divested by A's death before that age.[6]

Under a devise to A for so long, and until her son B attain the age of

[1] *Callynath Naugh Chowdhry* v. *Chunder Nath Naugh Chaudhry*, L. R., 8 Cal., 379; (S. C.) 10 C. L. R., 207.

[2] I. L. R., 6 All., 583.

[3] The "division" of the testator's estate was held to mean the ascertainment of the amounts allotable to the share of each legatee after the conversion of the estate into money. See *Collison* v. *Barber*, L. R., 12 Ch. D., 834; *Chaston* v. *Seago*, L. R., 18 Ch. D., 218, *Spencer* v. *Duckworth*, L. R., 18 Ch. D., 634.

[4] *Pinbery* v. *Elken*, 1 P. W., 563; *Barnes* v. *Allen*, 1 Bro. C. C., 181.

[5] Indian Succession Act, s. 106, illustration (*f*); See *Maseyk* v. *Fergusson*, I. L. R., 4 Cal., 308, and the cases there cited in argument.

[6] *Simmonds* v. *Cocks*, 29 Beav., 455.

twenty-one, and after he shall have attained that age, to B in fee, B takes a vested interest.[1] In this case, however, the estate given to B is, in fact, a remainder, taking effect on the determination of the preceding estate. Similarly, if a fund be bequeathed to A for life and after his death to B, on the testator's death, the legacy to B becomes vested in interest in B.[2]

Where a testator gave real and personal estate to M. H., her heirs, executors, administrators, and assigns, absolutely, if she should be living at the death of the testator's wife, but in case M. H. should die in the lifetime of the testator's wife without leaving issue, then over,—it was held, that M. H. took an absolute interest, liable to be divested only in the event of her death in the lifetime of the testator's widow without leaving issue.[3] Under a devise to a widow for life if she does not marry, and if she marry again, over, the gift over vests immediately and takes effect either on the death or marriage, and is not contingent upon the latter event.[4] Similarly, a gift over following a gift to A for life, or until he become bankrupt, takes effect either on death or bankruptcy.[5] But, a different construction will be given if the gift over is solely dependent on marriage or bankruptcy.[6] It is an established rule where a testator gives a woman a life-interest, if she so long remains unmarried, and then directs that in the event of her marriage the property shall go over to another, that, although according to strict language the gift over is expressed only to take effect in the event of the marriage of the tenant-for-life, the gift over is to take effect even though the tenant-for-life does not marry.[7]

If the testator himself direct that a legacy shall vest in interest at a particular time,[8] or direct that the legatee shall take, if he attain a particular age, but not otherwise,[9] the legacy will not vest before the time fixed. But a declaration that legatees shall become *beneficially interested* at a particular time, is not equivalent to a direction that their interests shall vest at that time. Such a declaration, it has been held, refers only to vesting in possession.[10] The word 'vested,' however, is sometimes held to be used in the sense of 'payable,' as where the shares of members of a class are directed

[1] *Taylor* v *Biddlall*, 2 Mod., 289.

[2] Indian Succession Act, s. 106, illustration (*d*).

[3] *Finch* v. *Lane*, L R., 10 Eq., 501; *Phipps* v. *Ackers*, 9 Cl. and Fin., 58.

[4] *Luxford* v. *Cheeke*, 3 Lev., 126; *Meeds* v. *Wood*, 19 Beav , 215.

[5] *Etches* v. *Etches*, 3 Drew., 441.

[6] *Sheffield* v. *Lord Orrery*, 3 Atk., 282.

[7] *Eaton* v. *Hewitt*, 2 Dr. and Sm., 184,192; *Browne* v. *Hammond*, *Joh.*, 210,214; *Underhill* v. *Roden*, L. R., 2 Ch. D., 494; see *Stanford* v. *Stanford*, 31 Ch. D , 362, p 365

[8] *Glanvill* v. *Glanvill*, 2 Mer. 38.

[9] *Knight* v. *Cameron*, 14 Ves., 389.

[10] *McLachlan* v. *Tait*, 28 Beav., 407.

to be vested at a particular time, and there is a gift over to the other members of the class of the shares of those dying before that time without issue.[1]

Where a testator devised lands to T for life, and *from and after* his decease to his eldest son, if he should arrive at the age of 21 years, and in default of his having a son, over, the Court of appeal held that, on the death of T, the eldest son took an estate in fee liable to be divested on his death under age,[2] the words 'from and after' being taken to mean immediately after. There is a presumption, it seems, in favour of the vesting of residuary bequests.[3]

A bequest to B to be paid to him at the death of C becomes vested in interest in B upon the death of the testator, and if B dies before C, his representatives are entitled to the legacy.[4]

Where a sum is directed by a testator to be paid at a given epoch, such as the legatees attaining twenty-one or marriage coupled with a limitation to some one for life, so that the legacy does not become vested in possession until the death of the tenant-for-life and there is also a gift over, the Courts in England have been in the habit of regarding the two circumstances of attaining twenty-one and surviving the tenant-for-life in the following manner:—The first circumstance, that of attaining twenty-one is considered personal to the donee, and the second, that of surviving the tenant-for-life one which affects the arrangement of the estate by which payment is postponed until after the life-estate has determined, and in determining when the share becomes vested, the Courts have disregarded the postponement as to the estate and looked at the personal period only which is pointed out.[5] The principle turns upon the desire not to postpone the vesting of the interest given and not to make it depend upon the accident of the legatee surviving the tenant-for-life.

In *Mendham* v. *Williams*,[6] the testator devised his real estates to his widow for life, and after her death directed the executors to sell and divide the proceeds equally between his seven children, the shares of his three sons to be vested in them respectively when and as they should attain twenty-one, and the shares of his four daughters to be vested interests in them when and as they attained that age or married. There was a direction, also, that during the minorities of his children their shares were to be invested and applied towards their maintenance, and it was provided that in case any of the children should

[1] *Taylor* v. *Frobisher*, 5 DeG. and S., 191; *Re Edmonston's Estate*, L R., 5 Eq., 389, *Williams* v. *Haythorne*, L. R., 6 Ch., 782.

[2] *Andrew* v. *Andrew*, L. R, 1 Chan, Div., 410.

[3] *Booth* v. *Booth*, 4 Ves., 399; *Jones* v. *Mackilwain*, 1 Russ., 220; Intestate and Testamentary Succession in India, p. 139.

[4] Indian Succession Act, s. 106, illustration (*a*), following *Halifax* v. *Wilson*, 16 Ves., 168.

[5] *Mendham* v. *Williams*, L. R., 2 Eq.. 396, *per* PAGE WOOD, V. C: *Walker* v. *Main*, 1 Ves., Sen. 208; *Emperor* v. *Rolfe*, 13 Sim, 561; *Mocatto* v. *Lindo*, 9 Sim., 56.

[6] L. R., 2 Eq., 396.

die leaving issue lawfully begotten "before the share of such child or children so dying as aforesaid should become due and payable" the share was to be equally divided "amongst all the issue of such child or children as and when such issue shall attain the said age of twenty-one years," the interest of such child so dying leaving issue to be applied for the advancement of such issue during minority. One of the testator's daughters died in the lifetime of the testator's widow, and leaving an infant child and having assigned his share by way of mortgage. It was held that the words "due and payable" did not postpone the vesting of the share until the death of the tenant-for-life and that the assignee of the deceased daughter was entitled, and not her infant child, under the gift over. So, in a later case[1] the testator bequeathed an annuity to his daughter and directed that after her death the trustees should hold £2000, part of the fund set apart to secure the annuity, upon trust to pay and divide the same unto and equally between the child and children of the daughter as and when they should respectively attain twenty-one, and in case any of the children should die before their shares should become "payable as aforesaid," the share or shares of him, her or them so dying should be paid to the survivor or survivors of them equally, if more than one, and if but one, the whole to that one, with power for the trustees during the respective minorities of the children to apply the income of their shares towards their maintenance and education; and, if all the children should die under twenty-one without leaving issue, there was a gift over. The Court held that the chidren's shares absolutely vested at twenty-one and were not divested by subsequent death without issue in the lifetime of their mother.[2]

Section 54 of the Indian Succession Act, like s. 15 of the Wills Act, enacts that gifts to an attesting witness or to the wife or husband of an attesting witness shall be void, but neither Statute directs that the gift is to be treated as if it were struck out of the will. Accordingly, in a case where there was a gift to A for life which was void because of A's wife having attested the will, and it was directed that at A's death the capital and income of the fund should be paid to child or children of A, in equal shares, with gifts over in case A should die without leaving issue living at his death, and A had no children, it was held that, until A had a child, the gifts upon the determination of A's life-estate could not be accelerated, and that, during the life of A and so long as he had no children, the income of the trust funds was undisposed of, and could not be accumulated for the benefit of the persons contingently entitled in remainder.[3]

[1] *Partridge* v. *Baylis*, L. R., 17 Ch. D., 835.

[2] See *In re Wilmott's Trusts*, L. R., 7 Eq., 532; *Day* v. *Radcliffe*, 3 Ch. D., 654; see also *Wakefield* v. *Moffet*, L. R., 10 H. L., 422.

[3] *In re Townsend's Estate*, L. R., 34 Ch. D., 357.

A contingent bequest is a bequest which is contingent upon the happening or not happening of a specified uncertain event. In the one case it does not vest, until that event happens; in the other, until the happening of that event becomes impossible.[1] There is an exception, however, where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit, but in such case the bequest of the fund is not considered contingent, but as vested.[2] The theory is that, where the principal is given at a distant period and the whole income is given in the meantime, the Court, leaning, as it does, in favour of vesting, will say that the whole thing is given. If, however, there occurs an interval or gap which separates the gift of the income from the principal, the bequest will not vest before the period fixed The exception referred to, in the case of a fund where the income of the fund is given is in accordance with the English law. In the case of *Hart's Trusts*,[3] the testator directed his trustees to pay £500 to his daughter when she should attain twenty-five, and that the legacy should carry interest to be paid towards her maintenance until she attained twenty-five, and, although she died under twenty-five, it was held that she took a vested interest. It made no difference, as pointed out by Mr. Theobald,[4] whose statement of the law was approved of by JESSELL, M. R., in the case of *In re Bunn*,[5] whether the interest is first given up to a given time and then the principal, or *vice versâ*, at any rate if the age fixed is either twenty-one or some later age, but such as to indicate that the testator had fixed upon it only from the probable incapacity of the legatees to manage their property satisfactorily earlier.[6]

In the case of *Scotney* v. *Lomer*,[7] a testatrix by her will appointed two-fifths of certain property to trustees upon trust to pay the income to her son until he should attain the age of forty, and then to hold the same in trust for her son, his executors and administrators, provided that in case her son should assign his share in the property, then the bequests made should be void, and the two-fifths should be held upon the trusts declared in respect of the other three-fifths. The son died before he attained the age of forty, and it was held that the two-fifths

[1] Indian Succession Act, s. 107. This section applies to Hindus etc under Hindu Wills Act.

[2] Indian Succession Act, s. 107, Exception.

[3] *Hart's Trusts*, 3 DeG. and J , 195 ; *In re Bunn*, L R., 16 Ch D , 47.

[4] On Wills, p. 386.

[5] L. R., 19 Ch. D., 47.

[6] *Wadley* v. *North*, 3 Ves., 364 ; *Westwood* v. *Southey*, 2 Sim., N. S , 192 ; *Bird* v. *Maybury*, 33 Beav., 351 ; *Pearman* v. *Pearman*, 33 Beav., 394 ; *Pearson* v. *Dolman*, L R , 3 Eq , 315.

[7] L. R., 29 Ch. D., 535, but see *Batsford* v. *Kebbell*, 8 Ves., 363.

vested in trust for him absolutely so as to pass by his will.[1] In all cases where ultimately, as in *Saundars* v. *Vautier*,[2] the accumulated interest, whatever it may be, is to go to the same legatee, then the whole gift is vested.[3] In *Vawdry* v. *Geddes*,[4] SIR J. LEACH explained, that where interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property.[5]

Generally speaking, if the gift of maintenance be not co-extensive with the whole amount of the interest,[6] or if it be made out of another fund,[7] in neither case, will the legacies vest prior to the arrival of the periods at which they are payable, for such provisions afford no presumption that the testator intended the legacies to vest before they became due.[8] Where, however, the principal and interest are blended together in one gift, and the principal is given on a contingency, as where there is a bequest of a specific sum and interest or accumulated interest to A as soon as he attains twenty-one, the entire gift is contingent.[9]

In England it seems that a discretion either to apply the interest to maintenance, or to accumulate it, will not vest the legacy of the fund;[10] nor a discretion to apply the whole or part not exceeding a fixed sum to maintenance.[11]

In *Merry* v. *Hill*,[12] the testator gave the residue of his property to trustees to assign and transfer the same to and amongst all and every such child or children of M, as should be living at his (testator's) death, to be equally divided among them, if more than one, when they should attain the age of 21; and, if there should be but one, who should attain the age of 21, then the whole to such child absolutely. Power was given to the trustees to pay and apply the whole or part (at their discretion) of the annual dividends and produce, not

[1] See *In re Bunn*, L. R, 16 Ch. D., 47; *Pearson* v. *Dolman*, L. R., 3 Eq., 315; *Webb* v. *Sadler*, L. R., 8 Ch, 419.

[2] 1 Cr and Ph., 240.

[3] See *Pearson* v. *Dolman*, L. R., 3 Eq., 315.

[4] 1 Russ. and My., 208

[5] See *Saundars* v. *Vautier*, 1 Cr. and Ph., 240; *Hoath* v. *Hoath*, 2 Bro. C. C., 4; *Pearson* v. *Dolman*, L. R., 3 Eq., 315; *In re Beavan's Trusts*, L. R., 34 Ch. D., 716; Indian Succession Act, s. 107, illustrations (*l*) and (*m*).

[6] *Pulsford* v. *Hunter*, 3 Bro. C. C., 416; *Re Ashmore's Trusts*, L. R., 9 Eq., 99.

[7] See illustration (*m*) to section 107 of the Indian Succession Act.

[8] Williams on Executors, 1242.

[9] *Knight* v. *Knight*, 2 S. and S., 490; *Locke* v. *Lamb*, L. R., 4 Eq., 372; Intestate and Testamentary Succession in India, p. 142.

[10] *Vawdry* v. *Geddes*, 1 L. R. and M., 203.

[11] *Merry* v. *Hill*, L. R., 8 Eq., 619.

[12] L. R., 8 Eq., 619.

exceeding Rs 100 a year for each child towards their maintenance and education until they attained the age of 21, and, during the suspense of absolute vesting, the residue of the annual proceeds was to be accumulated for the benefit of the persons who should become entitled to the principal MALINS, V C, applying the rule laid down in *Leake* v. *Robinson*,[1] that, whenever you can finally come to the conclusion, upon the construction of the whole language of the will, that the gift is to be found in the direction to pay or divide, then the attainment of the age at which that payment or division is to take place is a condition precedent to the vesting, held that no child of M who did not attain 21 could take a vested interest.[2] The Indian Succession Act, in declaring that a direction that so much of the income as may be necessary may be applied for the benefit of the legatee, will vest the legacy, has apparently gone beyond the English cases upon this point.[3]

It would seem that a gift of a fixed sum for maintenance will not vest a legacy, although it may be equivalent to interest on the legacy.[4] In *Pearson* v. *Dolman*,[5] it was said that if an interval or gap occurs which separates the gift of the income from the principal, the fund is not vested.

It will be observed that there is an important distinction between a contingent bequest and a bequest vested in interest subject to being divested. In the latter case, if there is no prior interest, the legatee is entitled to the income during the term of suspense. In the former case, the person, in whom the bequest is, at a future time, to be vested, has no interest in the income of the subject of the bequest.[6] Where a specific legacy is given on the happening of a contingency the interim income and any accretions until the happening of the contengency falls into the residue of the testator's estate or goes to his next-of-kin as the case may be.[7]

Among words which usually indicate conditions or contingencies with reference to age or time are these: 'provided,' 'if,' 'in case,' 'in the event of,' 'when,' 'as and when,' 'should,' 'on,' 'upon,' 'at,' 'from and after;' but, it seems that a different effect has been attributed to such words in England according as they have been applied to realty or personalty. Thus, while a devise to A, provided he

[1] 2 Mer, 363

[2] See *Judd* v *Judd*, 4 Sim, 525; *Shumm* v. *Hobbs*, 3 Drew, 93; *Locke* v. *Lamb*, L. R., 5 Eq, 372.

[3] See *Watson* v. *Hayes*, 5 My. and Cr. 125; *Eeles* v. *Birkett*, 4 DeG. and S., 105; *In re Grimshaw's Trusts*, L R, 11 Ch. D, 406; also see *Fox* v *Fox*, L R., 19 Eq, 286; *In re Parker*, L. R, 16 Ch. D, 44.

[4] *Boughton* v. *Boughton*, 1 H L., 406.

[5] L. R, 3 Eq., 315, p 321.

[6] *Duffield* v. *Duffield*, 3 Bli., N. S, 330, *per* BEST, C. J

[7] *Guthrie* v *Walrond*, L. R., 22 Ch. D, 573; see *In re Dumble*, L R, 23 Ch D., 360.

attains twenty-one, gives a vested estate liable to be divested,[1] where a legacy was given to A, provided he attained twenty-one, with a gift over if he died under that age, the condition was held to be a condition precedent.[2] In *Prescott* v. *Holmes*,[3] all the previous cases are collected. WOOD, V. C., in commenting on the cases in which 'when' or 'if' is used, observed, that if a testator gives personal property in that form, it clearly does not vest, while if he gives real estate, it clearly does. That case was followed in *Re Eddell's Trust*.[4] The general rule as to personalty is thus laid down in Williams on Executors, 1236:—"If the words 'payable' or 'to be paid' are omitted, and the legacy is given *at* twenty-one or, *if*, *when*, *in case*, or *provided*, the legatee attain twenty-one, or *on* his attaining that age, or any future definite period, this confers on him a contingent interest, which depends for its vesting and its transmissibility to his executors or administrators on his being alive at the period specified."

A devise to A, provided she lives to attain twenty-one, has been held to be vested subject to being divested.[5] So, where there is a gift to A for life, and if she marry again, over, the gift over is not contingent, but vests immediately.[6] But a legacy to A, to be paid as soon as he attains twenty-one, and in case he attains that age, *not otherwise*, is contingent.[7]

The exact events on which a gift over is to take place must happen. Thus, under a gift to C "if A should die before B without leaving a widow or child, after his death and B's death," was held to fail, on A's surviving B, though he died without leaving a widow or child.[8]

It is important to distinguish between gifts to a class on a contingency and gifts to a contingent class. The general rule, under the Indian Succession Act, and also according to the English authorities, is that where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy.[9]

[1] *Simmonds* v. *Cocks*, 29 Beav., 455

[2] *Atkinson* v. *Turner*, 2 Atk., 41

[3] 10 Jur., N. S., 507.

[4] L. R., 11 Eq, 559.

[5] *Simmonds* v. *Cocks*, 29 Beav., 455.

[6] *Luxford* v. *Cheeke*, 3 Lev., 126; *Meeds* v. *Wood*, 10 Beav., 215.

[7] *Knight* v. *Cameron*, 14 Ves., 389. See *Browne* v. *Browne*, 3 Sm. and G., 578; *Holmes* v *Prescott*, 10 Jur., N. S, 507; *Re Eddells Trusts*, L. R., 11 Eq, 559; Intestate and Testamentary Succession in India, p. 142.

[8] *Holmes* v. *Cradock*, 3 Ves., 317; see *Re Sander's Trusts*, L. R, 1 Eq., 675.

[9] Indian Succession Act, s. 108. This section applies to Hindus etc, under the Hindu Wills Act

Thus, a gift to children who shall have attained 21, or such children as shall have attained 21, is a gift to a contingent class; and no child who has not attained that age can have a vested interest,[1] the reason being, as pointed out by BEST, C. J., in *Duffield* v. *Duffield*,[2] that until he attains the age of 21, no child completely answers the description of those who are to be legatees. A gift of interest or income by way of maintenance, which in the case of a bequest to a class upon a contingency has the effect of vesting the bequest,[3] will not have that effect in the case of a bequest to a contingent class.[4]

In *Leake* v. *Robinson*,[5] it was laid down as a canon of construction that where is no gift except a direction to pay as the objects attain twenty-five, the attainment of the age is of the essence of the gift, which must be read as a bequest to those only of the class who attain the specified age, and this canon has been applied in many cases.[6] In some cases, however, the rule has given way to particular indications of a contrary intention.[7] In *Bree* v. *Perfect* the gift was upon trust to pay the interest to F. B. for life, and at her death the principal to be equally divided "among such of her children as shall be living at the time of her death, as they respectively attain twenty-one," but, if she should "die without leaving issue," over. On the ground of the limitation over the Court held that the principal vested in the children living at the death of F. B. So, in the case of *In re Beavan's Trusts*,[8] where the testatrix by her will, dated 1828, gave all her property to trustees, upon trust, as to the interest of a sum of £5000, for her sister for life and, after the death of such sister, the interest to be paid to the testatrix's daughter (she having first attained twenty-five); if the daughter married with the consent of the executors and died "leaving children, the interest to be appropriated for the maintenance and education of such children," and "the principal to be divided amongst them, as they shall severally attain the age of twenty-five years"; after the death of the sister and in the event of the daughter marrying without consent or marrying with consent "and dying without leaving issue," then over, and the

[1] *Bull* v. *Pritchard*, 1 Russ., 213; *Leake* v. *Robinson*, 2 Mer, 363; *Thomas* v. *Wilberforce*, 31 Beav., 299; *Williams* v *Haythorne*, L. R., 6 Ch., 782; *Ballin* v. *Ballin*, I. L R., 8 Cal., 218

[2] 3 Bli., p. 333.

[3] See Exception to section 107 of the Indian Succession Act.

[4] *Leeming* v. *Sherratt*, 2 Hare, 14; *Merry* v. *Hill*, L. R, 8 Eq., 619; *Re Ashmore's Trust* L. R., 9 Eq., 99; see illustration to section 108 of the Indian Succession Act

[5] 2 Mer., 363.

[6] See *Walker* v. *Mower*, 16 Beav, 365; *Gardiner* v. *Slater*, 25 Beav., 509; *Thomas* v. *Wilberforce*, 31 Beav., 299; *Murray* v. *Tancred*, 10 Sim., 465; *Boughton* v. *James*, 1 Coll., 26 *Main* v. *Quilter*, 2 Y and C. Ch., 465.

[7] *Bree* v. *Perfect*, 1 Coll., 128; *Ingram* v. *Suckling*, 7 W. R., 386; cited 34 Ch. D., p., 719; *In re Beavan's Trusts*, L. R., 34 Ch. D., 716

[8] L. R., 34 Ch. D., 716

daughter survived the testatrix, who died in 1886, attained twenty-five and, after marrying in 1842 with the necessary consent, died in 1886, having had two children who survived her, it was held that the gift was not void for remoteness, but that the fund vested in the children of the daughter living at her death.

Where there is no direction as to vesting, a bequest, upon trust, to all the children of A on their respectively attaining twenty-one, and if one child, to such child, the contingency as to attaining twenty-one is not imported into the gift to the single child.[1] If there is a distinction between the gift and the time of payment, if there be a clear gift the direction as to payment at a given age will not postpone the vesting.[2] And, so long as there is a gift independently of the direction to pay, it is immaterial whether the direction precedes or follows the gift.[3]

We have seen that, under the Indian Succession Act, a legacy bequeathed in case a specified uncertain event shall happen, or in case such an event shall not happen does not vest, until, in the former case, the event happens, or in the latter, the happening of the event becomes impossible.[4] But under s. 111 of the same Act, which applies also to all persons to whom the Hindu Wills Act is applicable, if a legacy be given, if a specified uncertain event shall happen, and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect at all, unless that event happens before the period when the fund bequeathed is payable or distributable. Thus, if a legacy is bequeathed to A and in case of his death to B, the legacy to B does not take effect if A survives the testator.[5] In England the rule is the same.[6] Where there is a bequest simply to A and "in case of his death," or, "if he die," then to B, A will take absolutely if he survive the testator. The bequest over in the event of the death of the preceding legatee refers to the event occurring in the lifetime of the testator, this construction being made, *ex necessitate rei*, from the absence of any other period to which the words can be referred, as a testator is not supposed to contemplate the event of himself surviving the objects of his bounty.[7] In *Edwards* v. *Edwards*,[8] the Master of the Rolls, in considering the case, as put by him, of a gift to A, and if he shall die to B, said: "In such cases it may

[1] *Walker* v. *Mower*, 16 Beav., 365; *Johnson* v. *Faulds*, L. R., 5 Eq. 268.

[2] *Shrimpton* v. *Shrimpton*, 31 Beav. 425; *May* v. *Wood*, 3 Bro. C. C., 471.

[3] *In re Bartholemew*, 1 Mac. and G., 354.

[4] Indian Succession Act, s. 107. This section applies to Hindus etc. under the Hindu Wills Act.

[5] Indian Succession Act, s. 111, illustration (*a*). This section also applies to Hindus etc. under the Hindu Wills Act.

[6] *Edwards* v. *Edwards*, 15 Beav., 361-2; *Home* v. *Pillans*, 2 My. and K., 20.

[7] 2 Jarm., 756.

[8] 15 Beav., 361-2.

be considered to be settled, that the bequest may be read somewhat to this effect,—namely, a bequest to A, but if A shall die before the bequest becomes vested in him, then to B." So, in *Home* v. *Pillans*,[1] LORD BROUGHAM, said,—"A bequest to any person, and in case of his death to another, is an absolute bequest to the first legatee, if he survives the testator, and this whatever be the form of expression, as 'if he die,' or 'should he happen to die,' 'in case death should happen to him,' and so forth."

Where the gift is not immediate but future, and there is another time to which the death of the preceding legatee may be referred (as obviously is the case where the bequest is to take effect in possession at a period subsequent to the testator's decease) the words in question are considered as extending to the event of the legatee dying in the interval between the testator's death and the period of vesting in possession.[2] Where the testator associates the event of death with a collateral circumstance there is no reason, unless it be found in the context of the will, why the gift over should not take effect in the event of the prior legatee's dying under the circumstances at any period. In England, cases of this kind are divisible into two classes, (1) where the question is, whether the substituted gift takes effect in the event of the prior legatee dying under the circumstances described by the testator in the testator's lifetime; and (2) where the question is, whether the substituted gift takes effect in the event of the prior legatee surviving the testator, and afterwards dying under the circumstances described; and if so, whether at any time subsequently.[3] In the first class of cases it is a rule that where the gift is to a particular person with a gift over in the event of his dying without issue, or under any other prescribed circumstances, and the event happens accordingly in the testator's lifetime, the ulterior gift takes effect immediately on the testator's death as an absolute gift.[4] Thus, in the case of a legacy to A and, in the event of his death without children, to B, if A dies without issue in the lifetime of the testator, B takes an absolute gift on the testator's death. This is so, also, under the Indian Succession Act.[5]

If in the case of a gift to A the words "and if he shall die" or "in case of his death, to B" were to be read literally, there would be in the first place an absolute gift, and then a gift over in the event of death, an event not contingent but certain. To avoid the repugnancy of an absolute giving and an absolute taking away, the Courts were forced to read the words "in case of death" or "if he die" as meaning in case of death before the interest vests. There is a clear distinction between such a case and the case already

[1] 2 My. and K., 20.

[2] 2 Jarm., 756.

[3] 2 Jarm., 761.

[4] 2 Jarm., 762.

[5] Indian Succession Act, s. 111, illustration (b).

referred to, of a gift to A for life, and if he should die without children, to B. There the event, as pointed out by the Master of the Rolls in *Edwards* v. *Edwards*,[1] upon which the legacy is to go over is not a certain but a contingent event. It is not in case of the death of A, but in case of his death without children. If, therefore, at any time, whether before or after the death of the testator, A should die without leaving a child, the gift over takes effect, and the legacy vests in B.[2] Where the legacy is to A, when, and if he attains the age of 18, and in case of his death to B, and A attains the age of 18, the legacy to B will not take effect, both according to the rules of construction in England and under the Succession Act.[3] The bequest in that case to A becomes indefeasible on his attaining the prescribed age. Had A died under 18 in the lifetime of the testator, the bequest to B would have taken effect.[4] but if he had survived the testator, the gift would not have been indefeasible until he had attained the age of 18. In the case of *Home* v. *Pillans*,[5] where the bequest was to A and B, when, and if they should attain their ages of 21 years, and in the case of the death of either of them leaving children, the share of such of them so dying, to their respective children, the gift over was held to be restricted to the contingency of A or B dying under 21 without children, the period of distribution being when A and B repectively attained 21. On attaining 21, A and B respectively took absolute interests in the gift.[6]

If there is a gift to a particular person, with a gift over if he should die under a particular age, as a gift to A, and if he dies under 21, to B, the gift over will not take effect if A dies over 21 in the lifetime of the testator, for in that case the legacy to A fails merely by reason of its having lapsed, that not being the contingency upon which the gift over was to take effect. Similarly, in the case already stated of a bequest to A and in the case of his death without children, to B, and A dies in the lifetime of the testator leaving a child[7] the first bequest lapses and the gift over will not take effect.

Illustration (*d*) to s. 111 of the Indian Succession Act is as follows:—"A legacy is bequeathed to A for life, and after his death to B, and 'in case of B's death without children,' to C. The words 'in case of B's death without children' are to be understood as meaning in case B shall die without children during the lifetime of A." It is in accordance with what is known as the fourth rule in

[1] 15 Beav., 363.

[2] *Allen* v. *Farthing*, cited 2 Jarm., 783; see *O'Mahoney* v. *Burdett*, L. R., 7 H L, p 395

[3] Indian Succession Act, s. 111, illustration (*c*); *Home* v. *Pillans*, 2 My. and K, 15

[4] *Darrell* v. *Molesworth*, 2 Vern., 375.

[5] 2 My. and K., 15.

[6] See *O'Mahoney* v. *Burdett*, L. R., 7 H. L., 388; see also *Gosling* v. *Townshend*, 17 Beav. 245; *Cooper* v. *Cooper*, 1 K. and J., 658

[7] Indian Succession Act, s. 111, illustration (*b*).

Edwards v. *Edwards*,[1] stated by ROMILLY, M. R., who held, that, in the case of a gift to A for life, with remainder to B, and if he shall without leaving children to C, the contingency had reference to the death of the tenant-for-life.

That rule was still in force as a rule of construction in England when the Indian Succession Act was passed. It has since, however, been overruled in two recent cases decided by the House of Lords in 1874,[2] it being held that the gift over will take effect upon the death of B at any time without issue, whether before or after the tenant-for-life.

If there is gift after a life-estate and "in case of the death of the legatee" there is a gift over, the event of death refers to death in the lifetime of the tenant-for-life, that is, at any time before the vesting in possession, whether before or after the death of the testator.[3] This is in accordance with the third rule in the case of *Edwards* v. *Edwards*, which is adopted in illustration (*e*) to s. 111 of his Indian Succession Act. That illustration is as follows: "A legacy is bequeathed to A for life, and after his death to B, and 'in case of B's death,' to C. The words 'in case of B's death' are to be considered as meaning 'in case B shall die in the lifetime of A.'" Here B will take absolutely if he survives A, but if not, the gift over will take effect The reason for the rule is thus explained by Mr. Hawkins: "Where a gift of the absolute interest in property to one person is followed by a gift of it to another in a particular event, the disposition of the Courts is to put such a construction on the gift over as will interfere as little as possible with the prior gift When death is spoken of as a *contingent event*, a gift over on the event of death may well be considered to mean, not death at any time but death before a particular period,—*e. g.*, the period of distribution; and thus the gift over may be read as a gift by way of substitution and not of remainder."[4]

In the case of *Bachman* v. *Bachman*,[5] to which reference has already been made, the testator directed his trustees to sell certain property and to divide the proceeds and certain other monies among the several persons named in a schedule to his will, in certain shares, as and when they should respectively attain the age of twenty-one in the case of males, and he directed that in the event of any of such persons dying in his lifetime or at any time thereafter "prior to the said division" leaving lawful issue, such issue should

[1] 15 Beav., 361.

[2] *O'Mahoney* v. *Burdett*, L R., 7 H L, 388 and *Ingram* v *Soutten*, *ibid*, 408; see *In re Parry* v. *Daggs*, L. R., 31 Ch. D, 130

[3] *Salisbury* v. *Pelly*, 3 Ha., 86; *Bolstho* v *Hallyar*, 34 Beav 150; *Green* v. *Barrow*, 10 Ha, 459; *Re Henderson*, 28 Beav., 656.

[4] Hawkins, 254

[5] I. L. R., 6 All., 583. See *supra*, p 235.

be entitled to the share which their deceased parent would have taken. One of the legatees, who had attained twenty-one in the lifetime of the testator, died five months after the testator, but before payment of the legacy and leaving lawful issue. On a claim being made by the personal representative of the deceased legatee, the question arose, whether the share vested absolutely in the legatee at the testator's death, and, if it did vest, whether under the terms of the will it was, in consequence of the death of the legatee before a division, divested, and it was held that the legacy had vested, but that, the legatee having died prior to the division of the estate, it became divested. The "division" of the testator's estate, it was considered, meant the ascertainment of the amounts allotable to the share of each legatee, after the conversion of the estate into money,[1] and accordingly it was held that the gift over took effect in favour of the legatee's issue. In *Collison* v. *Barber*,[2] the testator directed his trustees to divide the residue of certain funds to arise by sale of personal estate among two nephews and four neices, and directed that the shares of the nephews should be paid to them as soon after his death as possible; he also directed that in case any of his nephews or neices should die before him, or before the division of his estate as before directed, his shares should go over. FRY, J. adopting the reasoning of KINDERSLEY, V. C. in *In re Arrowsmith's Trust*,[3] held that the division of the estate meant the period allowed by the law for the division, that is, the expiration of twelve months after the testator's death That meaning, he said, was a reasonable meaning, and one which did not leave it to the caprice of the trustees to fix when the vesting or divesting of the shares should take place. The result was that the gift over was held to take effect upon one of the neices having died within a year from the testator's death. In *Hutcheon* v. *Mannington*[9] and *Martin* v. *Martin*[5] it was decided that, where such a divesting clause refers to the time of actual receipt, it is too indefinite to be capable of being carried into effect.[6] In another case[7] a gift over of a legacy or so much thereof as should not have been paid or received by the legatee was held not to be void for uncertainty, the ground of the decision being that the words referred, not to the time of actual payment or receipt, but to the time when it was the duty of the executors to pay the legacy. In *Bubb* v. *Padwick*,[8]

[1] See *Collison* v. *Barber*, L. R., 12 Ch. D., 834, *Chaston* v. *Seago*, L. R., 18 Ch. D., 218; *Spencer* v *Duckworth*, L R, 18 Ch D, 634

[2] L. R, 12 Ch. D., 834

[3] 29 L. J Ch., 774

[4] 1 Ves., 366.

[5] L. R., 2 Eq., 404

[6] See *Minors* v. *Battison*, L. R, 1 App C., 429

[7] *Chaston* v. *Seago*, L R, 18 Ch D, 218; see *Johnson* v. *Crook*, L. R., 12 Ch D., 639

[8] L R., 13 Ch D, 517

MALINS, V. C. expressed his dissent from *In re Arrowsmith's Trust*,[1] above referred to, but in *Chaston* v. *Seago*, FRY, J. stated that, in his opinion, it was a perfectly good decision.

A somewhat similar question was raised again before FRY, J, where a testator gave the residue of his estate equally among four persons, and gave the shares over to the children of the legatees, in case the legatees respectively should die before "the final destribution" of his estate. Two of the legatees died more than a year after the death of the testator but before the estate had been fully realized and distributed, and it was held that "the final division" meant the period of a year from the testator's death and that the shares of the deceased legatees had not gone over. As pointed out, however, by LORD ELDON in *Gaskell* v. *Harman*[2] if a testator thinks proper, whether prudently or not, to say distinctly, showing a manifest intention, that his legatees, pecuniary or residuary, shall not have the legacies or the residue, unless they live to receive them in hard cash, there is no rule against such intention, if clearly expressed, but as that would be open to so much inconvenience and fraud the Court is not in the habit of making conjectures in favour of such an intention On the other hand, if the words of the testator are clear that his intention was that a legacy should be divested, if the legatee should die before it is actually received, that intention must prevail. Thus, where a bequest was to A and in case of his death before the sum "shall be actually paid or payable," the gift over was held to take effect.[3]

The question of survivorship in case of bequests to a described class of persons has already been considered, and we have seen that, under s. 98 of the Indian Succession Act, where the bequest is made simply to such a class, the legacy goes only to such as are alive at the testator's death. Under s. 112 of the same Act "where a bequest is made to such of certain persons as shall be surviving at some period, but the exact period is not specified, the legacy shall go to such of them as shall be alive at the time of payment or distribution, unless a contrary intention appears by the will[4] The words "such of them as shall be alive" are doubtless intended to convey the same meaning as the "survivors or survivor" or "such as shall survive" and it will be immaterial whether the word "survivors" or "such as survive" be used.[5] The words 'survive' and 'survivor'

[1] 29 L. J. (Ch.), 774.

[2] 11 Ves, p 497.

[3] *Whitman* v. *Aitken*, L. R., 2 Eq., 414; See *Johnson* v. *Crook*, L. R., 12 Ch. D., 639; *Elwin* v. *Elwin*, 8 Ves, 547 See also *Hutcheon* v. *Mannington*, 1 Ves. 366, and *Martin* v. *Martin*, L. R., 2 Eq, 404.

[4] Section 112 applies to Hindus etc, under the Hindu Wills Act.

[5] *In re Sharpe's Estate*, 1 D. J. S., 453

import that the person who is to survive must be alive at the time of the event which he is to survive. Thus, a limitation to A in default of children or remote issue who should survive B, means children or remote issue living at B's death, and is not void for remoteness.[1] Only those of the class who are alive at the time indicated are entitled, the issue of other deceased members being excluded.[2] The Indian Succession Act, by section 112, merely lays down the general rule established in *Cripps* v. *Wolcott*,[3] that where property is given to the survivors or survivor of a class living at a particular time, the period of survivorship, as a general rule, refers to the time when the payment or distribution is to take place. "It is now settled," said LEACH, V. C. that "if a legacy be given to two or more, to be equally divided between them, or to the survivor or survivors of them, and there be no special intent to be found in the will that the survivorship is to be referred to the period of division, if there be no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy."[4] Accordingly, if the gift is immediate, the period of distribution is at the testator's death, as where, property is bequeathed to A and B, to be equally divided between them, or to the survivor of them. If both A and B survive the testator, the legacy is equally divided between them, but if A dies before the testator, and B survives the testator, it goes to B.[5] If the gift is not immediate, there being previous estates given, the period of distribution, and, in case of gifts to a class, the time of ascertaining the class entitled, is when such previous estates determine.[6] Thus, where property is bequeathed to A for life, and after his death to B and C, to be equally divided between them, or to the survivor of them, and B dies during the life of A, and C survives A, at A's death the legacy goes to C,[7] the period of distribution being the death of the tenant-for-life. But if the prior interest should determine in the lifetime of the testator, the result is the same as if the gift had been originally immediate, and the survivors are fixed at the death of the testator.[8]

In the case of a gift to a person for life, with remainder to his children,

[1] *Gee* v. *Liddel*, L. R., 2 Eq., 341.

[2] See *Davidson* v. *Dallas*, 14 Ves., 576; *Thompson* v. *Thompson*, 29 Beav., 654; *De Carognol* v. *Liardet*, 32 Beav., 608.

[3] 4 Madd., 11.

[4] *Stevenson* v. *Gullan*, 18 Beav., 590; *Howard* v. *Collins*, L. R., 5 Eq., 349.

[5] Indian Succession Act, s. 112, illustration (*a*); *Cripps* v. *Wolcott*, 4 Madd., 11; *Stevenson* v. *Gullan*, 18 Beav., 590; *Howard* v. *Collins*, L. R., 5 Eq., 349.

[6] *Cripps* v. *Wolcott*, 4 Madd., 11; *Wordsworth* v. *Word*, 1 H. L. C., 129; *Re Fox*, 35 Beav., *Drakeford* v. *Drakeford*, 33 Beav., 43.

[7] Indian Succession Act, s. 112, illustration (*b*); *Hearn* v. *Baker*, 2 K. and J., 383.

[8] *Spurrell* v. *Spurrell*, 11 Ha., 54; *Daniell* v. *Daniell*, 6 Ves., 297.

or such of them as shall be living at his decease,[1] or to a person for life, and after his decease to his children *or the survivors*,[2] the children of the life-tenant take vested estates subject to be divested in favour of such as survive the tenant-for-life. Accordingly, if all predecease the tenant-for-life, their representatives will take, for the event which was to divest them not having happened, the original gift remains.[3]

The question whether a person survived a particular event is one of proof, and whoever has to make out the case of death at any particular time, must prove it by affirmative evidence, and those who claim under a person who is said to have survived a particular period, must prove that fact.[4] Where a person has not been heard of for seven years, there is a presumption of law that he is dead, but at what time within that period he died is not a matter of presumption but of evidence, and the *onus* of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential.[5] It was held in the case of *In re Phene's Trusts*,[6] that there was no presumption of law in favour of the continuance of life, a holding which is contrary to the former rule laid down in *Nepean* v. *Doe*,[7] that "the law presumes a person shown to be alive at a given time remains alive until the contrary be shown."[8]

It may appear from the will itself, even where there is a prior interest given, that the survivorship refers to the death of the testator and not to the death of the first taker. Thus, if property is bequeathed to A for life, and after his death to B and C, or the survivor, with a direction that, if B should not survive the testator, his children are to stand in his place, and if C dies during the life of the testator but B survives the testator, but dies in the lifetime of A, the legacy goes to the repesentative of B.[9] In that case the survivorship is considered to refer to the death of the testator and not to the death of the tenant-for-life, the words of survivorship and the condition of B's surviving the *testator* being in immediate connexion. Again, if, where property is bequeathed to A for life, and after his death to B and C, with a direction

[1] *Sturgess* v. *Pearson*, 4 Madd., 411.

[2] *Browne* v. *Kenyon*, 3 Madd., 410.

[3] See *Browne* v. *Kenyon*, 3 Madd. 410, *per* SIR JOHN LEACH, V. C.; see *Re Sander's Trusts*, L. R., 1 Eq., 675; *Harrison* v. *Foreman*, 5 Ves., 207.

[4] *In re Lewes' Trusts*, L. R., 6 Ch., 356.

[5] *In re Phene's Trusts*, L. R, 5 Ch., App., 139.

[6] L. R., 5 Ch. App., 139.

[7] 2 M. and W, 912.

[8] See *In re Walker*, L. R., 7 Ch., 120; Intestate and Testamentary Succession in India, p. 148

[9] Indian Succession Act, s. 112, illustration (*c*); *Rogers* v. *Towsey*, 9 Jur., 575.

that in case either of them dies in the lifetime of A, the whole shall go to the survivor, B dies in the lifetime of A and afterwards C dies in the lifetime of A, the legacy will go to the representative of C. In this case the survivorship is taken from the special form of the gift to have reference to one of the remaindermen surviving *the other*, and not to their surviving the tenant-for-life. The legacy vests in C on the death of B, and accordingly, on his death in A's lifetime, goes to his representative.[1]

In some cases, too, survivorship has reference to the period of vesting. Thus, where a bequest was in trust to pay the income to children as they shall arrive at the age of twenty-one years, and then all the said children or the survivors of them to be let into full possession of the property, share and share alike, it was held, that the word 'survivors' upon the context of the will meant those surviving so as to attain their respective ages of twenty-one.[2]

The words condition and contingency are very often used in the same sense. In general, however, the word contingency has reference to the happening of an event, whereas the word condition has reference to the doing or forbearance from the doing of some act.

Conditions are of two kinds—conditions precedent and conditions subsequent. The former precede the vesting of estate; the latter are to be performed after the estate has become vested, and, if not performed, may in many cases cause interests already vested to be divested, or be altogether void.[3] Where the condition is precedent the estate is not in the grantee until the condition is performed, but where the condition is subsequent the estate vests immediately in the grantee and remains in him till the condition be broken.[4]

No particular words necessarily make a condition precedent, but the same words will make a condition precedent or subsequent according to the nature of the thing and the intention of the testator.[5] In determining, therefore, whether a condition is precedent or subsequent we must look, not merely to the particular words in which the condition is expressed, but to the whole context of the will, and if the meaning, as collected from the whole context, is that the estate is to vest, unless on a particular act being done or a particular event happening, then the condition, however expressed, is a condition precedent.[6] The law, as has already been pointed out, favours the vesting of

[1] See *Scurfield* v. *Howes*, 3 Bro. C. C., 90; *White* v. *Baker*, 2 D. F. and J., 55.

[2] *Crozier* v. *Fisher*, 4 Russ., 398; see also *Tribe* v. *Newland*, 5 DeG. and S., 236; *Corneck* v. *Wadman*, L. R., 7 Eq, 80; Intestate and Testamentary Succession in India, p. 147.

[3] See 2 Black. Com., 156; Co. Litt., 206.

[4] *Wynne* v. *Wynne*, 2 M. and G., 8, p. 14; Bro. Abr. tit. Condition, pl., 67 (*a*).

[5] *Acherley* v. *Vernon*, Wills, 153, p. 156.

[6] *Egerton* v. *Brownlow*, 4 H. L. Ca., 1, note, pp. 16, 19.

estates, and from the earliest times the Courts have been inclined to decide that estates devised were vested, and for the same reason have leaned towards constituting a condition to be subsequent rather than precedent.[1]

In England, in the case of a condition precedent it makes no difference that the event is impossible, or impolitic or illegal; the gift will not take effect, unless the condition is fulfilled.[2] But in the case of a condition subsequent if the condition is impossible, impolitic or illegal, the gift remains—at any rate where there is no gift over.[3] In England, too, in case of personalty, certain conditions subsequent, though good in law, are in accordance with the rule of the Civil Law, held to be void and *in terrorem* merely, if there is no gift over,[4] *e. g.*, conditions in partial restraint of marriage.

The Indian Succession Act has got rid of the rules of the Civil Law which have been adopted by the Courts of Equity in England with respect to conditional bequests. As to bequests of personal property, the Commissioners, in their report, say:—"On the subject of conditions we have deemed it right to abstain from introducing into India the very refined distinction which the Court of Chancery has, in questions relating to personal property, borrowed from the Ecclesiastical Courts. We think that the words of the will should be adhered to, where no condition inconsistent with law or morality is sought to be imposed; that all bequests made upon illegal, immoral, or impossible conditions should be void; and that wherever the testator's wishes can be carried into effect, if expressed in one way, they ought to be permitted to take effect, if expressed in another way, so that whatever he can do by a limitation he ought to be allowed to do by imposing a condition. It appears also to us, that whenever a condition subsequent is valid, if accompanied by a gift over, it ought to be valid without a gift over, and ought not to be treated as if it had been inserted merely to frighten the legatee by an unmeaning threat."

By the Civil Law, where a condition precedent to the vesting of a legacy was impossible, the legacy was considered as discharged of the condition, and the legatee was entitled, as if the legacy had been given unconditionally.[5] Under the Indian Succession Act, a bequest upon an impossible condition is void.[6] Thus, if an estate is bequeathed to A on condition that he shall walk one hundred miles in an hour, or if A bequeaths 500 rupees to B on condition that he shall marry A's daughter, and A's daughter was dead at the date of the

[1] *Duffield* v. *Duffield*, 3 Bli., N. S., 260, p 331; *Holmes* v. *Prescott*, 10 Jur., N. S., 507.

[2] *Egerton* v. *Brownlow*, 4 H. L. Ca., 1; Theobald on Wills, p. 374.

[3] Theobald on Wills, p. 418.

[4] Theobald on Wills, p. 422.

[5] See Williams on Executors, p. 1269.

[6] Indian Succession Act, s. 113. This section applies to Hindus etc., under the Hindu Wills Act.

will, the bequest in each case is void.[1] It would seem, also, that if a condition is impracticable, though not physically impossible, the legacy would be held by the Courts here to be void. Thus, in England, where a testator bequeathed property to a married woman upon condition that she conveyed an estate devised to her by another testator to her separate use with a clause against anticipation, the Court held, that the fact of the woman not being competent to make a valid conveyance of the estate, was fatal to the bequest.[2]

Again, the Indian Succession Act makes no distinction between conditions, the performance of which requires an act which is *malum in se*, and conditions, the performance of which requires an act which is against a rule or policy of the law, or *malum prohibitum*. Under its provisions any bequest upon a condition, the fulfilment of which would be contrary to law or morality is void,[3] as where the bequest is to B on condition that he will murder C, or to the neice of the testator, if she will desert her husband.[4] A bequest of an allowance to a married woman, on condition that she lived apart from her husband, was held to be *contra bonos mores*, and void.[5] With regard to conditions precedent which are illegal, in England, if performance requires an act which is *malum in se*, as to kill A, burn his house, or the like, then both by the Common Law and Civil Law, not only the condition, but the bequest itself, is void.[6] But where the illegality consists merely in the performance of the condition being against a rule or policy of the law, there, (although, by the Common Law, the devise as well as the condition is equally void as if there existed *malum in se*) by the Civil Law the condition only is void, and the bequest single and good.[7]

The general rule in England is that conditions precedent must be literally performed.[8] But in cases where the testator's intention might be satisfied by a performance of the condition in substances, *i. e.*, *cy près*, such performance has been held to be sufficient. This extensive limitation of the general rule of strict performance has been admitted by the Civil Law in all cases, where it is apparent that testators paid more regard to the end or fulfilment of the condition than to the means prescribed for the execution.[9] It is recognized in the Indian Succession Act, in section 115, which enacts that, where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has

[1] *Ibid*, illustrations (*a*) and (*b*).

[2] *Robinson* v. *Wheelwright*, 6 De G. M. and G., 535; see *Lowther* v. *Cavendish*, 1 Eq., 99.

[3] Sect. 114. This section applies to Hindus etc., under the Hindu Wills Act.

[4] *Ibid*, illustrations; see *Wren* v. *Bradley*, 2 DeG. and S., 49.

[5] *Brown* v. *Peck*, 1 Ed., 140; see also *Cartwright* v. *Cartwright*, 3 DeG. M. and G , 982.

[6] Williams on Executors, 1270, citing Swinb., Part IV, s. 6, p. 16.

[7] *Ibid*; Intestate and Testamentary Succession in India, p. 149.

[8] *Robinson* v. *Wheelwright*, 21 Beav., 214.

[9] Roper. Leg., 767 (4th Edition).

been substantially complied with.[1] As showing what is not a substantial compliance with the condition, the following illustration is appended to the section: —A legacy is bequeathed to A if he executes a certain document within a time specified in the will. The document is executed by A within a reasonable time, but not within the time specified in the will. A has not performed the condition, and is not entitled to receive the legacy.[2] In England, it has been held, according to Civil Law, that a condition that a legatee shall pay a sum of money,[3] within a given time, there being no gift over,[4] is not construed strictly, if in fact he has done so in a *reasonable* time. So, a condition to execute a release has been construed similarly,[5] but if the condition to execute a release within a particular time be in the form of a conditional limitation, it was held, it must be complied with.[6] The principle on which the English Courts have acted in cases where a condition requires a legatee to execute a release is, that if the period for executing the release is merely ancillary to the accomplishing of that object and the procurement of that instrument was the end and substance of the condition the legatee will be entitled if the release is in fact executed within a reasonable time.[7]

One of the most frequent conditions is that the legatee shall marry with the consent of a particular person or persons. In such cases consent may be implied from circumstances, as where the executor or trustee, whose consent is made a condition, witnesses the reception of addresses of marriage, and intimates no disapprobation, for then the maxim, *qui tacit, satis loquitur*, applies.[8] After a lapse of many years, consent by trustees to a marriage will be presumed, in the absence of any claim by the persons entitled to take advantage of the forfeiture.[9] To take the example furnished by illustration (*a*) to s. 115 of the Indian Succession Act: A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, D, and E. A marries with the written consent of B. C is present at the marriage. D sends a present to A previous to the marriage. E has been personally informed by A of his intentions, and has made no objection. A has fulfilled the condition.

Where consent to a marriage is the condition, it would seem that a general consent to any marriage is sufficient,[10] and it would seem, also, that the condition

[1] This section applies to Hindus etc., under the Hindu Wills Act.

[2] Indian Succession Act, s. 115, illustration (*g*).

[3] *Paine* v. *Hyde*, 4 Beav., 468.

[4] *Hollinrake* v. *Lister*, 1 Russ., 500, 508.

[5] *Hollinrake* v. *Lister*, 1 Russ., 500.

[6] *Simpson* v. *Vickers*, 14 Ves., 341.

[7] Williams on Executors, p. 1273.

[8] Williams on Executors, p. 1285, citing *Campbell* v. *Lord Netterville*, cited in 10 Ves., 243.

[9] *In the goods of Birch*, 17 Beav., 358.

[10] *Mercer* v. *Hall*, 4 Bro. C. C., 326; *Pollock* v. *Croft*, 1 Mer., 181.

would be complied with by a first marriage, and does not extend to a second marriage contracted without the consent of the person whose consent is required in the condition.[1] If one of the persons whose consent to a marriage is made a condition dies, a marriage with the consent of the others will be sufficient.[2] Thus in *Dawson* v. *Massey*,[3] where a bequest was to the children of the testator's sister on their marrying with the consent of their parents, it was held, that the consent mentioned in the will must be taken to be that of the parents or parent, if any, and that a daughter who had married with the consent of her surviving parent took a vested interest.[4] So, where the consent of several trustees or executors is required, and one disclaims or renounces, it has been held that the others alone may consent.[5] But where a legacy is given on condition that the legatee shall marry with the consent of trustees or other specified persons the consent of the majority, if they be all alive, will not be a substantial compliance with the condition,[6]

Where a bequest was given to the daughter of the testator on her attaining twenty-one or marrying with the consent of her "guardian or guardians," and the daughter married under twenty-one without the consent of any guardian or guardians, there being none, and died shortly afterwards under twenty-one, it was held that the condition was not complied with, the condition not having been made inoperative by reason of there being no guardians, since guardians could have been appointed by the Court.[7] Where a testator bequeathed his residuary personal estate to such persons as should within one year from his death establish their right or title thereto as his next-of-kin, with a gift over in default, and an order for limited administration, including an inquiry as to the next-of-kin, was made on summons shortly after the testator's death, but the persons who were next-of-kin did not bring in a claim within the year, it was held that the gift over took effect.[8]

A consent once given without any condition is not to be retracted from caprice or perverseness,[9] or unless it has been obtained through fraud or deceit.[10] Accordingly, if the required consent has been given to a marriage and is after-

[1] *Hutcheson* v. *Hammond*, 3 Bro. C. C., 128; *Crommelin* v. *Crommelin*, 3 Ves., 227.

[2] Indian Succession Act, s. 115, illustration (*b*).

[3] L. R., 2 Chan. Div., 753.

[4] See *Green* v. *Green*, 2 J. and Lat., 529, 753.

[5] *Worthington* v. *Evans*, 1 Sm. and Stu., 165.

[6] Indian Succession Act s. 115, illustration (*c*); *Clarke* v. *Parker*, 19 Ves., 1, *per* LORD ELDON, p. 24.

[7] *In re Brown's Will*, L. R., 18 Ch. D., 61.

[8] *In re Hartley*, L. R., 34 Ch. D., 742; see *Tollner* v. *Marriott*, 4 Sim., 19.

[9] *Dashwood* v. *Peyton*, 18 Ves., 27.

[10] *Merry* v. *Ryves*, 1 Eden, 1.

wards capriciously retracted and the marriage takes place, the condition will be considered to have been fulfilled.[1] Consent after the marriage is not a sufficient compliance with the condition, for no subsequent approbation can amount to a performance of the condition or dispense with the breach of it.[2] But if there had been a general consent to any marriage, subsequent approbation, unless the consent were required to be in writing, would have been sufficient.[3]

A bequest on condition that the legatee should marry with the consent of the testator's executors will take effect if the marriage take place in the testator's lifetime, and the testator himself expresses his approbation of the marriage either before or after the marriage,[4] for the consent of the executors is dispensed with by the testator's own consent, which is more, it is said, to be regarded than the consent of the executors to whom he had delegated a power to consent in case of a marriage after his decease.

Conditions in partial restraint only of marriage are in general valid. In *Perrin* v. *Lyon*,[5] the testator devised his real estate to his daughter subject to the condition that if she should marry a Scotchman, then she should forfeit all benefit under the will and the estate should go over. The daughter married a Scotchman, and it was held that the condition upon which the estate was to go over to other persons, was valid. So, in another case a condition that, if the legatee should marry a domestic servant, the bequest should be null and void, was held to be valid.[6]

A condition of forfeiture in case the legatee should embrace a particular faith is good.[7] And a condition requiring the legatee to reside at a particular place is valid.[8]

Another form of conditional bequest is where a bequest is given upon the failure of a prior bequest of the same thing. In such a case, the second bequest will generally take effect upon the failure of the prior bequest, although the failure may not have occurred in the manner contemplated by the testator.[9] But, where the will shows an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest will not take effect, unless the prior bequest fails in that particular

[1] Indian Succession Act, s. 115, illustration (*d*).

[2] *Ibid*, illustration (*e*).

[3] *Pollock* v. *Croft*, 1 Mer., 181.

[4] *Ibid*, illustration (*f*); *Clarke* v. *Berkeley*, 2 Vern., 720.

[5] 9 East, 170.

[6] *Jenner* v. *Turner*, L. R., 16 Ch. D., 188; see *Scott* v. *Tyler*, 2 Dick., 712; *Parsons* v. *Peter*, 11 Jur., N. S., 150.

[7] *Hodgson* v. *Halford*, L. R, 11 Ch. D., 959.

[8] *Wynne* v. *Fletcher*, 21 Beav., 430; *Walcot* v. *Botfield*, Kay. 534. As to what a sufficient compliance with a condition as to residence, see *In re Moir*, L. R., 25 Ch. D., 605.

[9] Indian Succession Act, s. 116. This section applies to Hindus etc, under the Hindu Wills Act.

manner.[1] This principle is thus referred to by MR. JUSTICE WILLIAMS:—"Instances have frequently occurred in which the Court has concluded from the context of the will, that the intention of the testator is effectually fulfilled by regarding a clause of apparent condition as a clause of *conditional limitation*, so as not to require, as in the case of a gift on a condition,[2] that the very event on which the gift is made contingent must be fulfilled with strict exactness, but paying regard, in the construction, to the substantial effect of the contingency specified and so to the real interest of the testator."[3]

In general, where there is a subsequent limitation, limited to take effect on the failure of a preceding one, if the preceding limitation is removed, or does not arise, the subsequent limitation will take effect.[4] Thus, where there was a devise on condition that the devisee should execute a release in three months after the testator's death, but, *if he should neglect to do so*, the devise to go over, and the devisee died in the lifetime of the testator, the devise over was held to take effect.[5] So in *Jones* v. *Westcomb*,[6] where there was a bequest to the child, of which the testator's wife was *enceinte* and if such child died under twenty-one, over, and the wife was not *enceinte*, it was held that the gift over took effect.[7] In *Murray* v. *Jones*,[8] a gift over, after various limitations to the children of the testatrix in the event of their all dying under age and unmarried, was held to take effect, although the testatrix died without having had any child.[9] So, where there was a bequest to A, and if he shall die, to B, and A was dead at the date of the will, the principle was held to apply.[10]

The effect of an apparent intention on the part of the testator that the prior legacy shall fail in a particular manner before the second legacy can take effect, is exemplified by the following illustration to s. 117 of the Indian Succession Act, taken from the case of *Underwood* v. *Wing*:[11] "A makes a bequest to his wife, but in case she should die in his lifetime, bequeaths to B that which he had bequeathed to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The bequest to B

[1] Indian Succession Act, s. 117. This section also applies to Hindus etc., under the Hindu Wills Act.

[2] See Indian Succession Act, s. 107.

[3] Williams on Executors, 1274-75.

[4] See *Avelyn* v. *Ward*, 1 Ves. Sen., 420; *Tennant* v. *Heathfield*, 21 Beav., 255.

[5] *Avelyn* v. *Ward*, 1 Ves. Sen., 420; Indian Succession Act, s. 116, illustration (*b*).

[6] 1 Eq., Cas. Abr., 245.

[7] See *Meadows* v. *Parry*, 1 V. and B., 124; *Re Green's Trusts*, 6 Jur., N. S. 479.

[8] 2 V. and B., 313.

[9] This is practically illustration (*a*) to s. 116 of the Indian Succession Act.

[10] *Re Sheppard's Trusts*, 1 K. and J., 269; Intestate and Testamentary Succession in India, pp. 152-3.

[11] 4 DeG. M. and G., 633.

does not take effect." It may be here observed, with reference to that illustration, that by the law of England, the question of survivorship is matter of evidence, and not of positive regulation and enactment; and in the absence of evidence there is no conclusion of law on the subject. In the case of *Underwood* v. *Wing*,[1] it was held, that the gift over was dependent on the event of the testator surviving his wife. "*Primâ facie*," it was said by the LORD CHANCELLOR, "the next-of-kin will be entitled to the personal estate, and their right will only be displaced by some person coming forward and showing a valid and effectual disposition taking it away from them."

In *In re Smith's Trusts*,[2] there was a bequest, after the death of J, (to whom an annuity was given out of the fund) to E during her natural life, but in case of the death of E during the lifetime of J, then to M for life, and after the decease of E and M, then over. It was held by WOOD, V. C., that there was a sufficient indication of an intention to give a life-estate to M after the death of E, although E did not die in the lifetime of J. The principle was also applied in the case of *Mackinnon* v. *Sewell*.[3] There, there was a bequest to A for life, with ultimate remainder to the children of A living at her decease, to be paid to them after her death as they attained twenty-one, and, *if all died before attaining twenty-one*, then over. One child of A attained twenty-one, but no child survived her, and it was held that the gift over took effect.[4]

Conditions subsequent do not affect the vesting of estates, but, on non-performance, may operate to divest estates which have already vested. Under the Indian Succession Act, a bequest may be made to any person with the condition superadded that, in case a specified uncertain event shall happen, the thing bequeathed shall go to another person; or that, in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person, but in each case the ulterior bequest is subject to the rules contained in sections 107, 108, 109, 110, 111, 112, 113, 114, 116, 117 of the Act, to which reference has already been made.[5] The ulterior bequest cannot, however, take effect unless the condition is strictly fulfilled, for in order to divest a vested estate or interest by a gift over, the very event must happen.[6] In the case of *In re Moir*,[7] there was a

[1] 4 DeG. M. and G., 633.

[2] L. R., 1 Eq., 79.

[3] 2 M. and K., 202.

[4] See also *Tennant* v. *Heathfield*, 21 Beav., 255; Intestate and Testamentary Succession in India, p. 153.

[5] Indian Succession Act, s. 118. This section applies to Hindus etc., under the Hindu Wills Act.

[6] *Ibid*, s. 119, which also applies to Hindus etc. under the Hindu Wills Act; *Wagstaff* v. *Crosbie*, 2 Coll., 746; *Re Sander's Trusts*, L. R., 1 Eq., 675; see *In re Boddington*, L. R., 25 Ch. D., 685.

[7] L. R., 25 Ch. D., 605.

to G for life "provided, as a *sine qua non*" that he "within six months after my decease shall enter upon and take possession of" the property devised as his residence and place of abode and "shall thereafter during his life continue to reside thereon for at least six months (but not necessarily consecutively) in every year, "and after G's death or his failing to take possession and to reside" on the property, of the testator devised the same to G's first and other sons in tail male. G took possession within six months after the testator's decease, but, as to residence, during the year following the expiration of the six months, he was in the house for eighteen days only, and from the 1st of January to the 28th December in the year following the date of such expiration for no more than twenty-four days. He had, however, placed the house in charge of a staff of servants, paid the rates, kept horses and poultry in the stables and in the grounds, and his son, who was at College near, had stayed at the house on an average, on every alternate Saturday till Monday. It was held, that there was no forfeiture, as there had been a reasonable, if not a strict, compliance with the condition of residence.[1]

The original bequest, will not be affected if the ulterior bequest is not valid,[2] the general rule of law being, that an absolute interest is not to be taken away by a gift over, unless that gift may itself take effect.[3]

Where a condition subsequent is impossible,[4] or contrary to public policy,[5] or illegal,[6] it is void, and the bequest is freed from it as though it had been given unconditionally.[7] Conditions which are repugnant to estates already given are void,[8] as where there is a devise in fee followed by an absolute restraint upon alienation.[9] If the condition of an ulterior bequest be too vague for the Court to enforce it, it is void.[10] If an estate be given in fee, a condition giving it over on bankruptcy of the devisee has been held to be void.[11] So a gift which is absolute will not be affected by a subsequent gift over which is void for remoteness.[12] But where a life-interest is given, it may be deter-

[1] See *Astley* v. *Earl of Essex*, L. R., 18 Eq., 290, p. 295. *Wynne* v. *Fletcher*, 24 Beav., 430.

[2] *Ibid*, s. 120, which also applies to Hindus etc. under the Hindu Wills Act.

[3] *Green* v. *Harvey*, 1 Hare, 428, 431; *Watkins* v. *Weston*, 32 L. J., Ch., 396 and 609.

[4] Indian Succession Act, s. 120, illustration (*a*); *Lowther* v. *Cavendish*, Amb., 358; *Aislabie* v. *Rice*, 3 Madd., 256; *Walker* v. *Walker*, 2 DeG. F. and J., 255.

[5] *Curtwright* v. *Cartwright*, 3 DeG. M. and G., 982; Indian Succession Act, s. 120, illustration (*b*).

[6] *Ridgway* v. *Woodhouse*, 7 Beav., 437; *Egerton* v. *Lord Brownlow*, 4 H. of L., 1.

[7] Williams on Executors, 1270-71.

[8] *Bradley* v. *Piewoto*, 3 Ves., 325, *per* LORD ALVANLEY.

[9] *Hood* v. *Oglander*, 34 Beav., 523; *Hunt-Foulston* v. *Furber*, L. R., 3 Chan. Div., 255.

[10] *Fillingham* v. *Bromley*, T. and R., 530; see *Clavering* v. *Ellison*, 7 H. L. C., 707.

[11] *In re Machu*, L. R., 21 Ch. D., 838.

[12] *Ring* v. *Hardwick*, 2 Beav., 352; *Carver* v. *Bowles*, 2 R. and M., 306; Intestate and Testamentary Succession in India, p. 156.

mined by a conditional limitation over upon alienation or bankruptcy of the legatee.[1]

A condition that a legatee should not dispute the will is regarded, in England, as merely *in terrorem* in the case of a will as to personalty; and, therefore, a legatee, by having contested the will, did not forfeit his legacy, unless there was a gift over upon breach of the condition.[2] But this doctrine was never applied in the case of devises of real estate; on the contrary, it was decided in *Cooke* v. *Turner*,[3] that such a condition annexed to a devise of land was valid and effectual without a gift over, upon breach of the condition.[4] Under the Indian Succession Act, if there is a condition that the legatee shall not contest the will and he does so, the gift over will take effect.[5],

If, where a sum of money is bequeathed to A and B, and if either should die during the life of C, then to the survivor living at the death of C, A and B die before C, the gift over cannot take effect, but the representative of A takes one-half of the money, and the representative of B takes the other half.[6] In *Harrison* v. *Freeman*, A and B took vested interests, subject to being divested in favour of the survivor living at the death of C; but, inasmuch as neither survived C, the contingency which was to divest the legacy never happened.[7]

In the case of *Sturgess* v. *Pearson*,[8] there was a bequest to B of the interest of a fund for life, with a direction that the fund should be divided at B's death among her three children or such of them as should be living at her death. All the children of B died in her lifetime. The bequest over it was held could not take effect, but the interests of the children passed to their representatives. The Vice-Chancellor, SIR JOHN LEACH, said: "The vested interests first given by the will are, by the form of the expression, only defeated in case there shall be some, or one, and *not all* of the children living at the mother's death; but that event did not happen, for there was not one child living at the mother's death."[9]

In dealing with conditions precedent we have seen that where a legacy is given on condition that the legatee shall marry with the consent of certain

[1] *Hurst* v. *Hurst*, L. R., 21 Ch. D., 278; *Rochfort* v. *Hackman*, 9 Hare, 475.

[2] *Cleaver* v. *Spurling*, 2 P. W., 528.

[3] 15 M. and W., 727.

[4] 2 Jar., 57-8. Intestate and Testamentary Succession in India, p. 154.

[5] Indian Succession Act, s. 118, illustration (*b*).

[6] Indian Succession Act, s. 118, illustration (*d*). *Harrison* v. *Foreman*, 5 Ves., 207.

[7] See *Wagstaff* v. *Crosby*, 2 Coll., 746; *Re Sander's Trusts*, L. R., 1 Eq., 675.

[8] 4 Madd., 411. Illustration (*c*) to s. 118 of the Indian Succession Act is taken from the case.

[9] See *Seccombe* v. *Edwards*, 28 Beav., 440; *Boulton* v. *Pilcher*, 29 Beav., 633; *Potts* v *Atherton*, 28 L. J., Ch. 486; *Finch* v. *Lane*, L. R., W. Eq., 501; *Wing* v. *Angrove*, 8 H. L., Ca., 183; *Elliott* v. *Smith*, L. R., 22 Ch. D., 236.

specified persons, and one of them dies, a marriage with the consent of the others would be considered to be a sufficient compliance with the condition. A gift over, however, upon the same condition will not take effect under similar circumstances.[1] But where the gift over is subject to the proviso that the first taker shall marry with the consent of a particular person, a first marriage with his consent will prevent the gift over taking effect, even though the first taker became a widower and marry again without his consent,[2] for the condition being once complied with is released and consent to a second marriage is unnecessary.[3]

If the required consent becomes unattainable by the death of the person or persons whose consent is required, a marriage without consent will not cause a forfeiture, where the condition is subsequent. As to real property, or legacies charged on real property, it was held, in England, that a marriage in such a case did occasion a forfeiture.[4]

If a legacy is bequeathed to A, to be paid at 18, or marriage, with a proviso that if A dies under 18, or marries without the consent of B, the legacy shall go to C, and A marries under 18, without the consent of B, the bequest to C takes effect.[5] In *Desbody* v. *Boyville*,[6] it was held that a legacy payable at 18, or on marriage with consent, is payable either at that age or on marriage with consent under that age, although there is a gift over generally on marriage without consent.

A bequest under the Indian Succession Act may be made with the condition superadded that it shall cease to have effect in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.[7]

In accordance with the rule of the Civil Law, certain conditions subsequent were, in the case of personalty, held by the Courts in England to be void, and *in terrorem* merely, if there were no gift over.[8] The Indian Succession Act,[9] has got rid of that rule, and under that Act, wherever a condition subsequent is valid if accompanied by a gift over, it is valid without a gift over, and is not to be treated as *in terrorem*. Thus a proviso that a bequest shall cease if the legatee cut down a particular wood,[10] or marry under the age of 25 without

[1] Indian Succession Act, s. 119, illustration (*a*).

[2] *Ibid*, illustration (*b*).

[3] *Hutcheson* v. *Hammond*, 3 Bro. C. C., 158; *Crommelin* v. *Crommelin*, 9 Ves., 227; see *Taylor* v. *Austin*, 1 Drew, 459.

[4] *Peyton* v. *Bury*, 2 P. W., 626; *Collett* v. *Collett*, 35 Beav., 312.

[5] Indian Succession Act, s. 119, illustration (*c*).

[6] 2 P. W., 547.

[7] S. 121, which applies to Hindus etc. under the Hindu Wills Act.

[8] See *Cooke* v. *Turner*, 15 M. and W, 727; *Evanturel* v. *Evanturel*, L. R., 6 P. C., 11.

[9] Chap. XV.

[10] Indian Succession Act s. 121, illustration, (*a*).

the consent of the testator's executors,[1] or do not go to England within a given time,[2] or adopt the profession of religion,[3] if complied with, will cause the interest in the legacy to cease. So, where a fund is bequeathed to A for life and after his death to B, if B should then be living, with a proviso that, if B should become a nun, the bequest to her should cease to have any effect, B, by becoming a nun in the lifetime of A, will lose her contingent interest in the fund.[4] In order, however, that a condition that a bequest should cease to have effect may be valid, it is necessary that the event to which it relates should be one which could legally constitute the condition of a bequest as contemplated by s. 107 of the Indian Succession Act.[5] It is also a rule that if a legatee renders impossible, or indefinitely postpones, the doing of an act for which no particular time is specified and upon the non-performance of which a legacy is to cease to have effect, or go over to another, the legacy will go as if the legatee had died without performing the act.[6] Thus, in case of a bequest to A, with a proviso that, unless he enters the army, the legacy shall go over to B, B will be entitled to the legacy upon A's taking holy orders, and thus rendering it impossible for him to fulfil the condition.[7] If the proviso were that the interest in the legacy should cease if he did not marry a particular person and he married a stranger, this would be indefinitely postponing the fulfilment of the condition and the bequest would cease to have effect.[8] Where, however, a testator devised certain property to devisees for life, if either of them should marry into the families of R or G, and if not, to S, and the devisees married, but not into the favoured families, it was held that the gift over did not take effect, as the devisees had the whole of their lives to perform the condition.[9] But there the condition was a condition precedent. The performance of the act required, however, was indefinitely postponed.

A clause directing a forfeiture in case of the devisee not making a mansion house devised to him "his usual and common place of abode and residence" is not void for uncertainty,[10] and the condition must be complied with.[11]

[1] *Ibid*, illustration (*b*). [2] *Ibid*, illustration (*c*). [3] *Ibid*, illustration (*e*).

[4] *Ibid*, illustration (*e*); see *ex parte Dickson*, 1 Sim., N. S., 37; *Biddulph* v. *Lees*, E. B. and E., 289.

[5] Indian Succession Act, s. 122. This section applies to Hindus etc. under the Hindu Wills Act. As to s. 107, *vide supra*, p. 239.

[6] Indian Succession Act, s. 123, which is applicable to Hindus etc. under the Hindu Wills Act.

[7] Indian Succession Act, s, 123, illustration (*a*).

[8] *Ibid*, illustration (*b*).

[9] *Randal* v. *Payne*, 1 Bro. C. C., 55.

[10] *Wynne* v. *Fletcher*, 24 Beav., 430; *Fillingham* v. *Bromley*. See *In re Moir*, L. R., 25 Ch. D., 605; *Astley* v. *Earl of Essex*, L. R, 18 Eq., 290; *Walcot* v. *Botfield*, Kay, 534.

[11] *Walcot* v. *Botfield*, Kay, 534; see *In re Moir*, L. R., 25 Ch. D., 605.

It has always been a principle in the Courts of Equity in England that ignorance of a condition annexed to a gift by will does not protect a legatee from the consequences of not complying with the condition.[1] In *In re Hodge's Legacy*,[2] WICKENS, V. C., laid it down, that "neither ignorance, illness, nor neglect on the part of the executor to inform the legatee, can excuse him for not complying with the direction so as to entitle him to the gift." The rule, as laid down by s. 124 the Indian Succession Act, is as follows: Where the will requires an act to be performed by the legatee within a specified time, either as a condition to be fulfilled before the legacy is enjoyed, or as a condition upon the non-fulfilment of which the subject-matter of the bequest is to go over to another person, or the bequest is to cease to have effect, the act must be performed within the time specified, unless the performance of it be prevented by fraud, in which case such further time shall be allowed as shall be requisite to make up for the delay caused by such fraud.[3]

The proviso in section 124 of the Indian Succession Act, as to fraud, appears to have been suggested by an opinion expressed by WOOD, V. C., in *Brooke* v. *Garrod*,[4] that if, in the case before him, there had been fraud on the part of the trustees, or possibly such laches on their part as the Court would consider to have been the sole cause of the donee of the right of pre-emption, which had been given by the will, not complying, *modo et formâ*, with the conditions imposed by the will, the latter might have been entitled to relief. In that case a person had a right, under a will, of pre-emption for a given sum, provided he signified to the trustees within one month of the testator's death his option to purchase, and paid the purchase-money within a further period of two months, and he duly signified his option to the trustees, and applied to their solicitor for an abstract of the title, and the solicitor promised to take an early opportunity of seeing his client with reference to the application, but no abstract was furnished; and hearing nothing further, the donee of the right of pre-emption allowed the period of two months to elapse without paying the purchase-money, or taking any further steps in the matter. It was held, that the purchase-money not having been paid, the right of pre-emption was lost.[5]

It frequently happens that a bequest is given to a person for a particular purpose, or to benefit him in a particular way, as for the purpose of purchasing a country residence, or as annuity, or a commission in the army, or to place

[1] *Astley* v. *Earl of Essex*, L. R., 18 Eq., 290; see *per* JESSEL, M. R., p. 297.

[2] L. R., 16 Eq., 92.

[3] Indian Succession Act, s. 124. This section applies to Hindus etc. under the Hindu Wills Act.

[4] 3 R. and T. 605.

[5] *Brooke* v. *Garrod*, 3 K. and J., 608; see *Simpson* v. *Vickers*, 14 Ves., 311, 348; *Austin* v. *Tawney*, L. R., 2 Ch., 143; *Avelyn* v. *Ward*, 1 Ves., 204.

the legatee in business,[1] or to purchase a ring,[2] or lands,[3] or stock,[4] or for maintenance, or education,[5] or to bind the legatee as apprentice.[6] In such cases, if the fund given for the purpose is given absolutely to, or for the benefit of the legatee, he will be entitled to receive the legacy, as if the will had not contained any direction,[7] the principle being that a Court of Equity will not compel that to be done which the legatee might undo the next moment.[8] In *Stokes* v. *Cheek*,[9] where the testator directed an annuity to be purchased, ROMILLY, M. R., who directed the price of the annuity to be paid to the annuitants, said, "It is a useless form to direct a purchase, if the annuity is immediately to be sold again."[10] It makes no difference apparently in such cases, that there is a declaration in the will that the legatee is not to receive the capital in lieu of the annuity.[11]

The same principle is applied, both under the Indian Succession Act and in England, where a testator absolutely bequeaths a fund so as to sever it from his own estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, and upon failure of such objects the absolute gift prevails, as if the will had contained no such restriction.[12] In the case of *Lassence* v. *Tierney*,[13] it was said that the intention that the gift should be absolute as between the legatee and the estate is, as in all cases of construction, to be collected from the will, and not from there being words which, standing alone, would constitute an absolute gift.

Suppose a bequest is made of the residue of the testator's property to be divided equally among his daughters, and it is directed that the shares of the daughters shall be settled upon themselves respectively for life, and be paid to their children after their death, and all the daughters die unmarried, the representatives of each daughter will be entitled to her share of the residue.[14]

[1] Indian Succession Act, s. 125, illustration.

[2] *Apresce* v. *Apresce*, 1 V. and B., 364.

[3] *Hinton* v. *Pinke*, 1 P. W., 539.

[4] *Edwards* v. *Hall*, 11 Hare, 23.

[5] *Webb* v. *Kelly*, 9 Sim., 472.

[6] *Barlow* v. *Grant*, 1 Vern., 255.

[7] Indian Succession Act, s. 125, which applies to Hindus etc. under the Hindu Wills Act.

[8] See 1 Jarm. 397.

[9] 29 L. J., Ch., 922.

[10] See *Ford* v. *Batley*, 17 Beav., 303; *Campbell* v. *Brownrigg*, 1 Ph., 301.

[11] *Stokes* v. *Cheek*, 28 Beav., 620; (S. C.) 29 L. J., 9 Ch., 922.

[12] Indian Succession Act, s. 126, following *Lassence* v. *Tierney*, 1 Mac. and G., 551 *Kellett* v. *Kellett*, L. R., 3 H. L., 161; *Knox* v. *Hotham*, 15 Sim., 82; *Gibbons* v. *Hills*, 1 Dick., 324; *Ford* v. *Batley*, 17 Beav., 303; *Kerr* v. *Middlesex Hospital*, 2 DeG., M. and G., 583. Section 126 of the Indian Succession Act applies to Hindus etc., under the Hindu Wills Act.

[13] 1 Mac. and G., 551.

[14] Indian Succession Act, s. 126, illustration (*a*).

So, if there is a direction to trustees to raise a sum of money for the testator's daughter and a further direction that they shall invest the fund, and pay the income arising from it to her during her life, and divide the principal among her children after her death, and the daughter dies without having ever had a child, her representatives will be entitled to the fund.[1]

In *Palmer* v. *Flower*,[2] the legacy was of a sum to be expended in the purchase of a commission in the army, and on the purchase of the commissions in the army being abolished by royal warrant, it was held that the legatee was entitled to the sum given.

If the main object of a gift is to benefit the person who is to take and no other person is interested in the bequest, in that case if the gift cannot be applied to the purpose specified, or if the legatee prefers to have it otherwise applied, he has the option of saying that, although the testator has expressed his desire that the benefit is to be conferred in a particular form, he does not wish to have it that manner, and may ask the Court to give him the property. On the other hand, where the object is not solely for the benefit of the legatee, but some other purpose also is expressed by the testator independent of the object of benefiting the legatee, the principle laid down in the case of *Lassence* v. *Tierney*,[3] does not apply, and the legatee is not entitled to elect.[4] In *re Skinner's Trusts*,[5] the case was on the border line between these classes of cases. There the testator bequeathed certain manuscript books to trustees for his grandson "that he may provide for the said books being published to the best advantage for the interests of the said child, so as to contribute towards a fund to assist him when he goes to College," and also bequeathed £1000 towards the printing. It appeared that it was impossible to publish the books at a profit, and the Court held that the grandson was entitled to the £1000, on the ground chiefly that the primary intention was to benefit the legatee.

Under s. 127 of the Indian Succession Act, if a testator does not absolutely bequeath a fund, so as to sever it from his own estate, but gives it for certain purposes, and part of those purposes cannot be fulfilled, the fund, or so much of it as has not been exhausted upon the objects contemplated by the will, remains a part of the estate of the testator.[6] The same principle was thus laid down by LORD COTTENHAM: If there be no absolute

[1] *Ibid.*, illustration (*b*).

[2] L. R., 13 Eq., 250.

[3] 1 Mac. and G., 551.

[4] *Re Skinner's Trusts*, 1 J. and H, 102.

[5] 1 J. and H., 102, *per* PAGE WOOD, V. C.

[6] Indian Succession Act, s. 127, which is made applicable to Hindus etc. under the Hindu Wills Act.

gift as between the legatee and the estate and particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate as not having in such event been given away from it.[1] Thus, if A directs that his trustees shall invest a sum of money in a particular way, and shall pay the interest to his son for life, and at his death shall divide the principal among his children and the son dies without having ever had a child, the fund, after the son's death, belongs to the estate of the testator; or, if A bequeaths the residue of his estate to be divided equally among his daughters, with a direction that they are to have the interest only during their lives, and that at their decease the fund shall go to their children, and the daughters have no children, the fund belongs to the estate of the testator.[2]

Conditions annexed to bequests inconsistent with the enjoyment of property or restrictive of alienation are void, not only according to the law in England, but, as we have already seen, according to the ordinary rules of Hindu Law.[3] "A testator cannot" it was said by NORMAN, J.,[4] "in giving property by will impose conditions in contravention of the objects for which property exists, or contrary to the policy of the law. For instance suppose an estate were given to a man on condition that it should be allowed to relapse into jungle or never be cultivated, no one could doubt that such a condition would be void."[5] In *Sookmoy Chunder Dass* v. *Monohari Dassi*,[6] FIELD, J. remarked: "If their be a good gift of an estate and there be also a prohibition against alienation or partition, the gift will be good and the prohibition void.[7] When there is a good gift with an invalid restriction, the gift will be good, the restriction void. Where there is a general intention to create a valid estate and a particular intention to deprive such estate of its legal incidents, effect will be given to the general intention and the particular intention will be disregarded."

[1] *Lassence* v. *Tierney*, 1 Mac. and G., 562, *per* LORD COTTENHAM.

[2] Indian Succession Act, s. 127, illustrations (*a*) and (*b*).

[3] *Wills* v. *Hiscox*, 4 M. and C., 197; *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*, 2 B. L. R., (O. C. J.), 11; *Gokool Nath Guha* v. *Issur Lochun Roy*, I. L. R., 14 Cal. 222; *Raikishori Dasi* v. *Debendra Nath Sircar*, I. L. R., 15 Cal., 409, (P. C.); see pp. 51-53 *supra*.

[4] 2 B. L. R., (O. C. J.), p. 25.

[5] See *Attorney-General* v. *The Master of Catherine Hall*, Jacob., 395; *Carte* v. *Carte*, 3 Atk., 180; *Bradley* v. *Peixoto*, 3 Ves., 324; also *Netai Charan Pyne* v. *S. M. Ganga Dasi*, 4 B. L. R., (O. C. J.), 265, note; *Ramdhone Ghose* v. *Anund Chunder Ghose*, 2 Hyde, 108.

[6] I. L. R., 7 Cal., 279. This was affirmed by the Privy Council; see L. R., 12 I. A., 103, (S. C.), I. L. R., 11 Cal., 684.

[7] *Jatindra Mohun Tagore* v. *Ganendra Mohan Tagore*, 9 B. L. R., 404; *Krishnaramoni Dassi* v. *Ananda Krishna Bose*, 4 B. L. R., O. C. J. 131; *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*, 2 B. L. R., 26-27.

In the case of *Promotho Dossee* v. *Radhika Persaud Dutt*,[1] a Hindu by his will devised property, consisting of a family dwelling-house and land, to trustees for ever for the residence, maintenance and performance of the worship of the family idols, and he appointed his sons and their descendants in the strict male line to be shebaits of the idols for ever, making provision for their residence in the family dwelling house, and the will also contained a clause restraining any partition, division or alienation of the property so dedicated. It was held that the dedication was not a *bonâ fide* dedication, but an attempt to create an estate for the benefit of his descendants not sanctioned by the law.

A prohibition by a Hindu against his sons or descendants coming to a partition after his death is void. Thus, where a testator gave all his property to his sons, but directed that they should not make any division for twenty years, the restriction was held to be repugnant to the gift and therefore void.[2] In the case, however, of *Raikishori Dassi* v. *Debendra Nath Sircar*,[3] a provision for defraying the marriage expenses of sons from joint funds, with a direction in the will that until the youngest son should atttain majority, none of the sons should have a right to partition was held by the High Court, and apparently by the Privy Council, to be valid. An attempt to withdraw property given from liability to the debts of the legatee cannot be given effect to.[4]

While dealing with bequests with directions as to the application or enjoyment it will be convenient here to refer shortly to those cases where the question arises, whether by the use of words expressive of entreaty, wish, recommendation, request or direction, the testator has not created a trust. Trusts created by such words are usually called precatory trusts. They have been held to arise where a testator gives property and directs,[5] confides,[6] or trusts and confides,[7] hopes[8] and doubts not,[9] recommends,[10] well

[1] 14 B. L. R., 175.

[2] *Mokoondo Lall Shaw* v. *Gonesh Chunder Shaw*, I. L. R., 1 Cal., 104; see *Rajendra Dutt* v. *Sham Chund Mitter*, I. L. R., 6 Cal., 106.

[3] I. L. R., 15 Cal., 409, (P. C.).

[4] *Sonatun Bysack* v. *S. M. Juggutsoodery Dossee*, 8 M. I. A., 66, p. 76. See *Kumara Asima Krishna* v. *Kumara Kumara Krishna Deb*, 2 B. L. R., (O. C. J.) p. 28: See also *In re Machu*, L. R., 21 Ch. D., 838.

[5] *White* v. *Briggs*, 2 Ph., 583.

[6] *Griffths* v. *Evans*, 5. Beav., 241; *Shepherd* v. *Nottidge*, 2 J. and H., 766.

[7] *Wood* v. *Cox*, 1 Ke., 317; *Pilkington* v. *Boughey*, 12 Sim., 414; *Palmer* v. *Simmonds*, 2 Drew., 224; *Macnab* v. *Whitbread*, 17 Beav., 299.

[8] *Harland* v. *Trigg*, 1 Bro. C. C., 142.

[9] *Paul* v. *Compton*, 8 Ves., 380; *Parsons* v. *Baker*, 18 Ves., 476; *Taylor* v. *George*, 2 V. and B., 378; *Sale* v. *Moore*, 1 Sim., 534.

[10] *Horwood* v. *West*, 1 S. and S., 387; *Paul* v. *Compton*, 8 Ves., 380; *Tibbits* v. *Tibbits*, 19 Ves., 656; *Malim* v. *Keighly*, 2 Ves., 335; *Hart* v. *Tribe*, 18 Beav., 215; *Meggison* v. *Moore*, 2 Ves., 630; *Meredith* v. *Heneage*, 1 Sim., 553.

knows,[1] entreats,[2] desires,[3] or wills and desires,[4] requests,[5] or wishes and requests,[6] or requires and entreats,[7] wills,[8] wishes and desires,[9] most heartily beseeches,[10] orders and directs,[11] authorizes and empowers,[12] is well assured,[13] has the fullest confidence,[14] trusts,[15] has full assurance and confident hope,[16] is under the firm conviction,[17] or in the full belief,[18] or expresses his belief that the legatee will give[19] the property in a particular manner.[20]

In order to raise a trust, it is necessary in all such cases that not only the property but the objects of the trust must be pointed out with clearness and certainty.[21] In some of the older cases the Courts construed somewhat loose expressions into declarations of trust, but the tendency in recent times has been not to construe words into declarations of trusts except where the words are fairly definite and precise both as to the subject matter and objects of the trust.[22] "The current of decisions" said SIR A. HOBHOUSE,[23] "now prevalent for many years in the Court of Chancery shows that the doctrine of precatory

[1] *Briggs* v. *Penny*, 3 Mac. and G., 546.

[2] *Pierrot* v. *Clarke*, 2 Mad., 458; *Meredith* v. *Heneage*, 1 Sim., 353; *Taylor* v. *George*, 2 V. and B., 378.

[3] *Harding* v. *Glynn*, 1 Atk., 469; *Bonser* v. *Kinnear*, 2 Giff., 195; *Cary* v. *Cary*, 2 Sch. and Lef. 189.

[4] *Eeles* v. *England*, 2 Vern., 466; *Brich* v. *Wade*, 3 V. and B., 198; *Forbes* v. *Ball*, 3 Mer., 437.

[5] *Pierson* v. *Garnett*, 2 Bro. C. C., 38, 226; *Bernard* v. *Minshull*, Johns, 276.

[6] *Foley* v. *Parry*, 2 M. and R., 138; *Bernard* v. *Minshull*, Johns, 276.

[7] *Taylor* v. *George*, 2 V. and B., 378.

[8] *Eales* v. *England*, Pr. Ch., 200; *Cloudsley* v. *Pelham*, 1 Vern., 411.

[9] *Liddard* v. *Liddard*, 28 Beav., 266.

[10] *Meredith* v. *Heneage*, 1 Sim., 553.

[11] *Cary* v. *Cary*, 2 Sch. and Lef., 189; *White* v. *Briggs*, 2 Ph., 583.

[12] *Brown* v. *Higgs*, 4 Ves., 708, affirmed, 18 Ves., 192.

[13] *Macey* v. *Shurmer*, 1 Atk., 389; *Ray* v. *Adams*, 3 M. and K., 237.

[14] *Shovelton* v. *Shovelton*, 32 Beav., 143; *Curnick* v. *Tucker*, L. R, 17 Eq, 324; *Le Marchant* v. *Le Marchant*, L. R., 18 Eq., 414.

[15] *Irvine* v. *Sullivan*, L R., 8 Eq. 673.

[16] *Macnab* v. *Whitbread*. 17 Beav., 299.

[17] *Barnes* v. *Grant*, 2 Jur., N. S., 1127.

[18] *Fordham* v. *Spreight*, 23 W. R., (Eng.) 782.

[19] *Robinson* v. *Smith*, 6 Madd., 194; *Clifton* v. *Lambe*, Amb., 519; But see *Lechmere* v. *Lavie*, 2 M. and K., 195.

[20] See Agnew, *Law of Trusts*, p. 78.

[21] *Malim* v. *Keighley*, 2 Ves., 335; *Briggs* v. *Penny*, 3 Mac. and G., 546; *Bernard* v. *Minshull*, Johns, 276, 287; *Re Pinckard Trust*, 27, L. J. Ch, 422; *Hood* v. *Oglander*, 34 Beav., 523; *Mussoorie Bank* v. *Raynor*, I. L. R., 4 All., 500, (S. C.) L. R., 8 Ap. Ca., 321.

[22] See *Lambe* v. *Eames*, L. R., 6 Ch. p. 599, *Re Hutchinson and Tenant*, L. R., 8 Ch. D., 540; *Mussoorie Bank* v. *Raynor*, I. L. R., 4 All., 500, (S. C.), L. R., 7 Ap. Ca., 321.

[23] I. L. R., 4 All., p. 510.

trusts is not to be extended, and it is sufficient for that purpose to refer to the judgments given by LORD JUSTICE JAMES in the case of *Lambe* v. *Eames*,[1] and by SIR GEORGE JESSEL, in the case of *Re Hutchinson* v. *Tenant*."[2]

In *The Mussoorie Bank* v. *Raynor*,[3] the Privy Council say, "the rules are clear with respect to the doctrine of precatory trust; that the words of gift must be such that the Court finds them imperative on the first taker of the property and that the subject of the gift over be well-defined and certain. If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust, because the Court does not know upon what property to lay its hands, but the uncertainty in the subject of the gift has a reflex action upon the previous words and throws doubt upon the intention of the testator and seems to show that he could not possibly have intended his words of confidence, hope, or whatever they may be—his appeal to the conscience of the first taker—to be imperative words."

A bequest of property to a certain person hoping that he will continue it in the family will not create a trust, as the objects of the trust are not indicated with sufficient certainty.[4] In cases where such words as "family," "relations" or "heirs" are used, the Court will not imply a trust, if there is any doubt in what sense the testator used such words.[5] A bequest to A with a request that he should distribute it among such members of the family of B as he should think most deserving,[6] or a bequest to A with a desire by the testator that he will divide the rest of it among B's children,[7] will not give rise to an implied trust, as the subject-matter is not clearly or definitely indicated. So, a mere direction to a legatee to remember certain persons, without specifying any particular sum or property,[8] or to be kind to them,[9] will not create a trust, nor will a direction to deal justly by,[10] or consider,[11] or make ample provision for,[12] or divide and dispose of the savings,[13] or educate, or provide[14] for certain persons, raise a

[1] L. R. 10 Eq., 267, on appeal, L. R., 6 Ch. App., 601.

[2] L. R., 8 Ch. D., 540.

[3] I. L. R., 4 All., 502, S. C., L. R., 8 Ap., Ca., 321.

[4] *Harland* v. *Trigg*, 1 Bro. C. C., 142.

[5] *Harland* v. *Trigg*, 1 Bro C. C., 142; *Green* v. *Marsden*, 1 Drew., 646; *Meredith* v. *Heneage*, 1 Sim., 542; *White* v. *Briggs*, 2 Ph., 583.

[6] *Green* v. *Marsden*, 1 Drew., 646.

[7] *Palmer* v. *Simmonds*, 1 Drew., 221.

[8] *Bardswell* v. *Bardswell*, 9 Sim., 319.

[9] *Buggins* v. *Yates*, 9 Mod., 122; see *In re Bond*, L. R., 4 Ch. D., 238.

[10] *Pope* v. *Pope*, 10 Sim., 1; *Ellis* v. *Ellis*, 23 W. R., (Eng.), 382.

[11] *Sale* v. *Moore*, 1 Sim., 534; *Hoy* v. *Master*, 6 Sim., 568.

[12] *Winch* v. *Brutton*, 14 Sim., 379; *Fox* v. *Fox*, 27 Beav., 301.

[13] *Cowman* v. *Harrison*, 10 Ha., 234.

[14] *Macnab* v. *Whitbread*, 17 Beav., 299.

trust. Although a recommendation may in some cases amount to a direction and create a trust, yet if such a construction he inconsistent with any positive provision in the will, it is to be considered as a recommendation and nothing more.[1] Thus, where a testator after giving his daughter an absolute power of appointment by will over certain property recommended, though he did not absolutely enjoin her to distribute the same at his decease amongst her daughters in equal share, it was held that the words were merely precatory and did not create a trust.[2] So, words expressive of expectation only and not amounting even to a recommendation will not create a trust.[3]

If words are used, which ordinarily would give a legatee an absolute gift, with words superadded which would raise a trust, the legatee will take beneficially subject to the trust raised. Thus, where the words of gift were to A "for his own use and benefit, trusting and wholly confiding in his honour that he would act in strict accordance to my wishes," it was held that the donee took beneficially subject to a trust which was limited to the extent of the wishes which the testator had communicated to him.[4] So, where a testator gave and bequeathed the residue of his estate "to D absolutely trusting that she will carry out my wishes with regard to the same with which she is fully acquainted," it was held that D took the residue beneficially subject only to the performance of the testator's wishes communicated to her.[5]

In *Meredith* v. *Heneage*,[6] after giving his real and personal estate to his wife in fee, the testator went on to say he had so given the same to her unfettered and unlimited, in full confidence that in her future disposition thereof she would distinguish the heirs of his late father by devising the whole of his estate together and entire to such of his father's heirs as she might think best deserved her preference. It was held, that no trust was created. In *Johnston* v. *Rowland*,[7] there was a gift to the testator's wife "to be disposed of by her in such way as she shall think proper; but I recommend her to dispose of one-half thereof to her own relations, and the other half to such of my relations as she shall think proper." KNIGHT BRUCE, V. C., held that no trust was created. He said, "That the word 'recommend' may amount to a command in a particular instrument and may create a binding trust is cer-

[1] *Knott* v. *Cottee*, 9 Ph., 192, p. 196; *Shaw* v. *Lawlers*, 5 Cl. and F., 129.

[2] *Young* v. *Martin*, 2 Y. and C., 582; see *Eaton* v. *Watts*, L. R., 4 Eq., 151; *M'Cormick* v. *Grogan*, L. R., 4 H. L., 83; *Hood* v. *Oglander*, 34 Beav., 513.

[3] *Lechmere* v. *Lavie*, 2 M. and K., 197.

[4] *Wood* v. *Cox*, 2 My. and Cr., 684. As to secret trusts see *supra* pp. 71-73.

[5] *Irvine* v. *Sullivan*, L. R., 8 Eq., 673; see *Shelley* v. *Shelley*, L. R., 6 Eq., 540; *Bonser* v. *Kinnear*, 2 Giff., 195.

[6] 1 Sim., 542.

[7] 2 DeG. and S., 356.

tain. It is equally certain that the word is susceptible of a different interpretation—of an interpretation consistent with the legal and equitable power of the person recommended to depart from the recommendation."[1] Though property may be mentioned, out of which the trust is to be carried out, it must be clear what the property is before a trust can be implied. It is not sufficient that the legatee should be requested to give "whatever he can transfer,"[2] or the bulk,[3] or to divide the fund "when no longer required by her.[4]

In the case of *In re Hutchinson and Tenant*,[5] the testator gave all his property to his wife "absolutely with full power to her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so," and it was held that she took absolutely. So, in *Lambe* v. *Eames*,[6] where the testator gave his estate to his widow "to be at her disposal in any way she may think best for the benefit of herself and family," it was held that the widow took an absolute estate.

A legacy to A the better to enable him to pay his debts expresses the motive for the testator's bounty but creates no trust; nor does a legacy to enable him to maintain or educate and provide for his family.[7] Thus, if a legacy be given to a father that he may support himself and his children,[8] or to A to maintain and bring up B,[9] the legacy will be absolute.

Where a bequest imposes an obligation on the legatee he can take nothing by it, unless he accepts it fully,[10] but where the will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous.[11] Thus, if A having shares in X, a prosperous joint stock company, and also shares in Y, a joint stock company in difficulties, in respect of which

[1] See *Webb* v. *Wools*, 2 Sim. N. S., 267; *White* v. *Briggs*, 15 Sim., 33; *Parnall* v. *Parnall*, L. R., 9 Ch. D., 97.

[2] *Kent* v. *Hughes*, 6 Beav., 342.

[3] *Palmer* v. *Simmonds*, 2 Drew, 221.

[4] *Mussoorie Bank* v. *Raynor*, I. L. R., 4 All., 500, (S. C.) L. R., 6 Ap. Ca., 321; See *Gokool Nath Guha* v. *Issur Lochun Roy*, I. L. R., 14 Cal., 222; *Kumarasami* v. *Subbaraya*, I. L. R., 9 Mad., 325.

[5] L. R., 8 Ch. D., 540.

[6] L. R., 6 Ch., 597; see *In re Adams and Kensington Vestry*, L. R., 24 Ch. D., 192, on App. 27 Ch. D., 394; also see *Le Marchant* v. *Le Marchant*, L. R., 18 Eq., 414.

[7] *Benson* v. *Whittan*, 5 Sim., 22; *Andrews* v. *Partington*, 2 Cox., 223; *Brown* v. *Casamajor*, 4 Ves., 498; *Hammond* v. *Neame*, 1 Swans, 35: *Thorp* v. *Owen*, 2 Hare, 607.

[8] *Thorp* v. *Owen*, 2 Hare, 607.

[9] *Biddles* v. *Biddles*, 16 Sim., 1; *Jones* v. *Greatwood*, 16 Beav., 527.

[10] Indian Succession Act, s. 109. This section applies to Hindus etc. under the Hindu Wills Act.

[11] *Ibid*, s. 110, which applies to Hindus etc. under the Hindu Wills Act; *Guthrie* v. *Walrond*, L. R., 22 Ch. D., 573.

shares heavy calls are expected to be made, bequeaths to B all his shares in joint stock companies, and B refuses to accept the shares in Y, he forfeits the shares in X. But, if A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be let for, bequeaths to B the lease and a sum of money, and B refuses to accept the lease, he will not by this refusal forfeit the money.[1] This is in accordance with the rule in England, as laid down in the cases of *Andrew* v. *Trinity Hall*,[2] and *Warren* v. *Ruddall*.[3] It is no objection that the legatee, by repudiating an onerous bequest, will throw a burden on the testator's estate.[4]

Where onerous property and beneficial property are included in the same gift, *primâ facie*, it is the intention of the testator that the legatee shall not disclaim the onerous and accept the beneficial property.[5] In *Warren* v. *Ruddall*,[6] where the testator made several gifts to a devisee, one of which was a leasehold on which the testator was liable on his covenant to repair, WOOD, V. C., said: "If I saw here any intention to couple the gift of the life-interest in the freehold with the gift of the leasehold, so as to make the acceptance of the burden a condition of the benefit, the case would be different. But the testator's intention seems to me to have been exactly the contrary. In each gift his meaning was to bestow a bounty, not to impose a burden."[7] Even where the legacies, some of which are onerous and some beneficial, are not separate or independent, the *primâ facie* rule may be rebutted if the will manifests a sufficient intention of the testator's to the contrary.[8]

In England where a legacy is given to an executor, *primâ facie* it is given to him for his trouble, and if he refuses the office he is not entitled to it.[9] This rule has not, however, been adopted by the Indian Legislature to its full extent.

By s. 128 of the Indian Succession Act, if a legacy is bequeathed to a person, who is named an executor of the will, he shall not take the legacy unless he proves the will, or otherwise manifest an intention to act as executor,[10]

[1] *Ibid*, illustrations (*a*) and (*b*).

[2] 9 Ves., 525.

[3] 1 J. and H., 1.

[4] *Moffett* v. *Bates*, 3 Sm. and G., 468.

[5] *Green* v. *Britten*, L. J., 42 Ch., 187; *Talbot* v. *Lord Radnor*, 3 M. and K., 252; *Guthrie* v. *Walrond*, L. R., 22 Ch. D., 573.

[6] 1 J. and H., 1.

[7] *Ibid.*, p. 13. Intestate and Testamentary Succession in India, p. 144.

[8] *Guthrie* v. *Walrond*, L. R., 22 Ch. D., 573.

[9] *Piggott* v. *Green*, 6 Sim., 74.

[10] Section 128 of the Indian Succession Act, applies to Hindus etc. under the Hindu Wills Act.

and it has been held that the section is peremptory and leaves no room for a presumption. It is sufficient that the legatee is named as an executor.[1]

The rule applies generally to all gifts to a person named an exector by the will whether expressed to be for his care or trouble or to be given to him as executor or not. A *voluntary interference with the assets*, whether with or without probate, will stamp a person as acting executor,[2] provided the interference is not such as to be plainly referrible to some other ground than the part execution of the trust.[3] As to what will amount to manifesting an intention to act as executor, it seems that if a person named as an executor in the will orders the funeral of the deceased according to the directions contained in the will, but dies a few days after the testator without having proved the will, he will be considered to have manifested an intention to act as executor.[4] In *Lewis* v. *Mathews*,[5] the executor, to whom a legacy was left for his trouble, was in Australia at the death of the testator, and sent home a power-of-attorney, under which another person administered the estate. The executor died without proving the will, and it was held that he had sufficiently shown his intention to act under the trusts of the will, and that his representatives were entitled to the legacy. So, where a person appointed an executor renounced, but subsequently, before the real business of administering the estate was concluded, proved the will, it was held that he was entitled to the legacy given him by the will.[6] "As a general rule," it was said by KINDERSLEY, V. C., there must be unequivocal evidence of an intention to act, and that evidence is best given by the probate of the will. But I take it to be equally clear that *Harrison* v. *Rowley* is still law, and that it is not absolutely necessary to prove a will in order to entitle a person to a legacy as executor."[8] Inability from bodily or mental infirmity to prove the will or take up the duties of executor, is no excuse.[7]

In later years the rule in England, has been somewhat relaxed in favour of legatees,[9] and now the rule there appears to be that, *primâ facie*, a gift to an executor was given to him as executor; but the presumption may be

[1] *Prosono Coomar Ghose* v. *Administrator-General* of *Bengal*, I. L. R., 15 Cal., 83.

[2] Lewin on Trusts, 180.

[3] *Ibid.*, 181: see *Slaney* v. *Watney*, L. R., 2 Eq., 418; and *Lewis* v. *Mathews*, L. R., 8 Eq. 277.

[4] Indian Succession Act, s. 128, illustration; see *Harrison* v. *Rowley*, 4 Ves., 212.

[5] L. R., 8 Eq., 277.

[6] *Angerman* v. *Ford*, 29 Beav., 349; Intestate and Testamentary Succession in India, p. 163.

[8] *Lewis* v. *Mathews*, L. R., 8 Eq., 281. Intestate and Testamentary Succession in India, p. 163.

[7] *Hanbury* v. *Spooner*, 5 Beav., 630; *Re Hawkins*, 33 Beav., 570.

[9] *Cockerell* v. *Barber*, 2 Russ., 598.

rebutted, as where a motive can be assigned, or can be fairly inferred for the legacy irrespective of the appointment of the executor,[1] as where the gift was to a person appointed executor, as a relation,[2] or as a mark of friendship,[3] or as a mark of respect.[4] The old rule, it was held, did not apply to a bequest of a residue;[5] and if the gift is after a life-interest the presumption was rebutted.[6] But the mere fact, it has been held, that the gift of the legacy precedes the appointment of the legatee or executor—or that the legacies to several persons appointed as executors differ either in amount or subject-matter—is not enough by itself to rebut the presumption that a legacy given to a person who is appointed executor is annexed to the office.[7] Parol evidence is admissible to rebut the presumption.[8]

The rule as to admissibility of evidence to rebut the presumption which is raised in England, does not apply under the Indian Succession Act, where the law, as we have seen, is peremptory, and is not a mere question of presumption.[9]

[1] *Jewis* v. *Lawrence*, L. R., 8 Eq., 345; see *In re Appleton*, L. R., 29 Ch. D., 893.

[2] *Dix* v. *Reed*, 1 S. and S., 239.

[3] *Re Denby*, 3 DeG. F. and J., 350; *Bubb* v. *Yelverton*, L. R., 13 Eq., 131.

[4] *Burgess* v. *Burgess*, 1 Coll., 367.

[5] *Griffiths* v. *Pruen*, 11 Sim., 202; *Christian* v. *Devereux*, 12 Sim., 264.

[6] *In re Keen's Trusts*, L. R., 4 Ch. D., 841.

[7] *In re Appleton*, L. R., 29 Ch. D., 893.

[8] *Ibid.*

[9] *Prosono Coomar Ghose* v. *Administrator-General of Bengal*, I. L. R., 15 Cal., 83.

LECTURE IX.

GENERAL, SPECIFIC AND DEMONSTRATIVE LEGACIES, AND THE INCIDENTS ATTACHING TO LEGACIES.

General legacies—Specific legacies—Demonstrative legacies—Abatement of general legacies—Difference between specific and general legacies—Bequests in respect of land—Bequests of stock whether general or specific—Bequests of residue—Non ademption of Demonstrative legacies—Abatement of Demonstrative legacies—Ademption of legacies - Bequests of things described in general terms—Payment of liabilities in respect of the subject of the bequests—Bequests of the interest or produce of a fund—Bequests of annuities—Abatement of annuities—Payment of annuities—Appropriation of fund for payment of annuities—Legacies to Creditors and Portioners—Doctrine of Election—*Donatio mortis Causa.*

Legacies may be general or specific, and it is frequently a question of some difficulty whether a legacy is general or specific. A legacy is general when it is so given as not to amount to a bequest of any particular money or thing of the testator, distinguished from all others of the same kind, but is a bequest of something which is to be provided out of the testator's general estate. On the other hand where a testator bequeaths to any person a specified part of his property, which is distinguished from all other parts of his property, the legacy is said to be specific.[1] But, where a testator bequeaths a certain sum of money, or a certain quantity of any other commodity, and refers to a particular fund or stock, so as constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative.[2] In other words where specified property is given to the legatee, the legacy is specific; where the legacy is directed to be paid out of specified property, it is demonstrative.[3]

The distinction between specific legacies and general or pecuniary legacies is of great importance. For if there is a deficiency of assets to pay legacies a specific legacy is not liable to abate with the general legacies,[4] so that if the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement.[5] But, while the specific legatee has this advantage, on the other hand, if the testator sells the thing given, or converts it into property of another kind or it does not belong to the testator at the time of his death, he loses the legacy altogether by what is called ademption,[6] of which I shall have to speak hereafter. In *Ashton* v. *Ashton*,[7] LORD

[1] Indian Succession Act, s. 129.
[2] *Ibid.*, s. 137.
[3] *Ibid.*, s. 137, Expl.
[4] *Ibid.*, s. 136.
[5] *Ibid.*, s. 288.
[6] *Ibid.*, s. 139.
[7] 3 P. Wms.. 385.

TALBOT said, that "though specific legacies have, in some respects, the advantage of those that are pecuniary, so as to be paid *in toto* and not in average, on a deficiency of assets, yet, in other respects, they are distinguished to their disadvantage from pecuniary legacies, as, suppose they have been lost or aliened by the testator in his lifetime, they must then fail *in toto*,"—that is, in case of their being adeemed.

It may be here noticed that a specific legatee, when the legacy is of property producing income, has a further advantage over general and pecuniary legatees in the fact that he is entitled to the income from the date of the testator's death.[1]

The inclination of the Courts in England is against construing a legacy as specific where there is a reasonable doubt of the intention of the testator.[2] In cases of doubt, parol evidence of the state of the testator's funded property has been admitted to determine whether a legacy is to be considered as general or specific.[3] It has been held that a legacy may be specific even where it is declared in the will that "it shall not be deemed specific so as to be capable of ademption."[4]

The following examples of specific legacies taken mostly from the English Reports, are to be found in the Indian Succession Act:—

"The diamond ring presented to me by C;" "my gold chain;" "a certain bale of wool;" "a certain piece of cloth;" "the sum of 1,000 rupees in a certain chest;"[5] "the debt which B owes me;"[6] "all my bills, bonds, and securities belonging to me, lying in my lodgings in Calcutta;" "all my furniture in my house in Calcutta;" "all my goods on board a certain ship then lying in the river Hooghly;" "2,000 rupees which I have in the hands of C;"[7] "the money due to me on the bond of D;"[8] "my mortgage on the Rampore factory;" "one-half of the money owing to me on my mortgage of Rampore factory;" "1,000 rupees, being part of a debt due to me from C;" "my capital stock of 1,000*l.* in East India Stock;"[9] "my promissory notes of the Government of India for 10,000 rupees in their 4 per cent. loan;" "all such sums of money as my executors may, after my death, receive in respect of the debt due to me from the insolvent firm of D and Company;"[10] "all the wine which I may have

[1] See Indian Succession Act, s. 309.

[2] *Webster* v. *Hale*, 8 Ves., 410; *Kirby* v. *Potter*, 4 Ves., 748.

[3] *Attorney-General* v. *Grote*, 2 Rus. and My., 699.

[4] *Jacques* v. *Chambers*, 2 Coll., 435.

[5] *Lawson* v. *Stitch*, 1 Atk., 508.

[6] *Ellis* v. *Walker*, Ambl. 309; *Duncan* v. *Duncan*, 27 Beav., 386.

[7] *Hinton* v. *Pinke*, 1 P. Wms., 538; see *Crockat* v. *Crockat*, 2 P. Wms., 164; *Pulsford* v. *Hunter*, 3 Bro. C. C., 416.

[8] *Sidebotham* v. *Watson*, 11 Hare, 170.

[9] *Ashburner* v. *Macguire*, 2 Bro. C. C., 108; *Norris* v. *Harrison*, 2 Madd., 279, 280.

[10] *Fryer* v. *Morris*, 9 Ves., 360.

in my cellar at the time of my death;" "such of my horses as B may select;"[1] "all my shares in the Bank of Bengal;"[2] "all the shares in the Bank of Bengal, which I may possess at the time of my death;" "all the money which I have in the $5\frac{1}{2}$ per cent. loan of the Government of India;" "all the Government securities I shall be entitled to at the time of my decease."

A bequest of "all my household goods, which shall be in or about my dwelling-house in M street, in Calcutta, at the time my death," is specific.[3] So, a residuary disposition of all the testator's personal estate in a particular country,[4] or a bequest of all the testator's goods and moveables whatsoever in a particular room,[5] is specific. If A, having Government promissory notes for 10,000 rupees,[6] bequeaths to his executors "Government promissory notes for 10,000 rupees, in trust to sell" for the benefit of B; or having property at Benares, and also in other places, bequeaths to A all his property at Benares, the legacy in each case is specific.

Every devise of land is, from the very nature of the subject matter, specific,[6] and a devise of a rent charge out of a term has been held to be as much specific as if it had been of the term itself.[7] The gift, however, of an annuity to be paid out of the rents, or charged upon land, it was held, is not so specific as to fail, if the source from which it is to be paid fails, if it appears that there was a fixed, independent, separate and distinct intent to give the legacy, the particular property out of which it was to be paid being a secondary thought.[8] A mere gift, however, of an annuity charged upon land is specific.[9] But if a testator direct freehold or leasehold estate to be sold, and then dispose of the proceeds in such a manner as to show an intention that the legatees should take them specifically, the legacies will be specific.[10]

It seems to have been considered in England that, after the Wills Act,[11] which made the will speak from the death of the testator, a residuary devise of real estate was not specific;[12] but it is now settled, that such devises are still specific.[13]

[1] *Richards* v. *Richards*, 9 Price, 226.

[2] See *Bothamley* v. *Sherson*, L. R., 20 Eq., 304.

[3] Indian Succession Act, s. 129, illustration (*a*). *Gayre* v. *Gayre*, 2 Vern., 538.

[4] *Nisbett* v. *Murray*, 5 Ves., 149.

[5] *Green* v. *Symonds*, 1 Bro. C. C., 128, note.

[6] *Forester* v. *Leigh*, Amb., 171.

[7] *King* v. *Short*, 1 P. Wms., 402; *Patching* v. *Barnett*, 51 L. J., Ch., 74.

[8] *Mann* v. *Copeland*, 2 Madd., 223; see *Colville* v. *Middleton*, 3 Beav., 570.

[9] Indian Succession Act, s. 129, illustrations (*d*) and (*e*).

[10] *Page* v. *Leapingwell*, 18 Ves., 463. Indian Succession Act, s. 129, illustration (*d*).

[11] 1 Vict., c. 26.

[12] See *Dady* v. *Hartridge*, 1 Dr. and Sm., 241.

[13] *Hensman* v. *Fryer*, L. R., 3 Ch., 420; *Lancefield* v. *Iggulden*, L. R., 10 Ch., 136.

Under the Indian Succession Act, which also speaks from the death of the testator,[1] a residuary devise of real estate is also specific.

A bequest of all the testator's personal estate generally is not specific. The very terms of such a disposition demonstrate its generality.[2] But, if a man, having personal property elsewhere, bequeaths all his personal estate at a particular place, the legacy is specific, and all the personal property at that place will pass, and if there is a deficiency of assets to pay other legacies, this legacy will not abate with them.[3]

A bequest to buy a particular article or particular house or other property is not specific: nor is a bequest of a horse, or of an annuity worth so much, or of a particular sum of money.[4]

Where a particular sum of money is bequeathed, the legacy is not specific because the stock, funds or other securities in which it may be invested are described in the will.[5] Thus a bequest of "Rs. 10,000, now invested in shares of the East Indian Railway Co."[6] or "secured by mortgage of the Rampore Factory" or of "Rs. 10,000 of my funded property" is not specific.[7] In order that such a bequest should be construed as specific, it must clearly appear that the testator meant to bequeath the identical stock or funds. A gift of all "my stock in the M. R. Co." has been held to be a specific legacy,[8] and it would seem generally that where a legacy is of any kind of stock which is particularized by the word 'my,' or by any other expression which indicates the testator's intention of making it specific or individual, it is to be deemed specific.[9] But a direction to sell or transfer a certain amount of stock, or to pay it as soon as possible, will not make the bequest specific.[10]

If a bequest is made in general terms or in round numbers of a certain amount of stock, the mere fact that the testator at the date of his will was possessed of stock of the kind specified to an equal, or greater amount than the amount bequeathed, will not make the legacy specific.[11] It is in fact a question

[1] S. 77.

[2] Williams on Executors, 1177.

[3] *Sayer* v. *Sayer*, 2 Vern., 688; see *Gayre* v. *Gayre*, 2 Vern., 538, and the cases there cited

[4] Indian Sucession Act, s. 129, illustration (*f*). This section applies to Hindus etc. under the Hindu Wills Act

[5] Indian Succession Act, s. 130. This section also applies to Hindus etc. under the Hindu Wills Act.

[6] *Gillaume* v. *Adderley*, 15 Ves., 384.

[7] Indian Succession Act, s. 130. illustration.

[8] *Bothamley* v. *Sherson*, L. R., 20 Eq., 304.

[9] *Ashton* v. *Ashton*, 3 P. Wms, 384; see note to *Hinton* v. *Pinke*, 1 P. Wms., 538.

[10] *Sibley* v. *Perry*, 7 Ves., 522, p. 529; *Webster* v. *Hale*, 8 Ves., 440.

[11] Indian Succession Act, s. 131, following *Purse* v. *Snaplin*, 1 Atk., 413; *Partridge* v. *Partridge*, Cas. Temp. Talbot, 226; *Bronsden* v. *Winter*, Amb., 57; *Gillaume* v. *Adderley*, 15 Ves.,

of intention whether a legacy which is invested in stocks or funds is a specific legacy or not.[1] The actual gift of the legacy may not contain words showing that it is specific, but it may appear from other parts of the will that it is so.[2] In *Jeffreys* v. *Jeffreys*,[3] the testator gave a legacy of £2702 3*s*., Bank of England stock, and £2000 of stock in the East India Company and, at the time he made his will, he had exactly that amount of stock. The Court considered that this fact was a strong argument in favour of the legacy being specific, and treating it accordingly held that the sale of portion of the stock was an ademption *pro tanto*.[4]

In *Page* v. *Young*,[5] a legacy was given in these words—"I give to A the interest of £4,500 money in the funds for her absolute use and benefit," followed by specific gifts to the same legatee, and the words "and at A's decease the funded property to H." The testatrix had, at the date of the will, an absolute interest in £4,000 consols. It was held that the gift was a specific gift to A for life with a gift over to H absolutely. MALINS, V. C., said, "I am of opinion, looking at the situation of the testatrix, that she intended it (the form of expression) to mean my money in the funds," that is, money already in the funds.

A direction that a money legacy is not to be paid until some part of the testator's property shall have been reduced to a particular form, or remitted to a particular place will not, of itself, make the legacy specific.[6] Thus, where there is a direction that a legacy shall not be paid till the testator's property in India be realized in England will not make the legacy specific.[7] The direction is looked upon as a direction for the mere convenience of the estate. So, where sums of money are bequeathed by a testator, who has property in England and in India, to persons resident in each place, with a direction that

385; *Sleech* v. *Torrington*, 2 Ves. Sen., 560; *Webster* v. *Hale*, 8 Ves., 410; *MacDonald* v. *Irvine*, L. R., 8 Ch. D., 101; *Purse* v. *Snaplin*, 1 Atk., 415; *Wilson* v. *Brownsmith*, 9 Ves., 180; Section 131 of the Indian Succession Act applies to Hindus etc. under the Hindu Wills Act.

[1] See *Partridge* v. *Partridge*, Cases Temp. Talbot, p. 226.

[2] See *Townseand* v. *Martin*, 7 Hare, 471; *Hosking* v. *Nicholls*, 1 Y. and C. C., 478; *Millard* v. *Bailey*, L. R., 1 Eq., 378; In *Ashton* v. *Ashton*, Cases, Temp. Talbot, 152; *Jeffreys* v. *Jeffreys*, 3 Atk., 120; *Page* v. *Young*, L. R., 19 Eq., 501, where legacies were held to be specific. See Indian Succession Act, s. 131, illustration.

[3] 3 Atk., 120.

[4] See *Avelyn* v. *Ward*, 1 Ves. Sen., 424-5; Indian Succession Act, s. 131, illustration.

[5] L. R., 19 Eq., 501.

[6] Indian Succession Act, s. 132. This section applies to Hindus etc. under the Hindu Wills Act.

[7] *Ibid.*, illustration. This illustration is borrowed from the case of *Sadler* v. *Turner*, 8 Ves., 617, where the testator bequeathed to A and B £1,000 each, "which legacies I direct to be paid as soon as my property in India shall be realized in England," and it was held, that the legatees would have been entitled to satisfaction, although all the property of the testator should have been transmitted to England in his lifetime.

they shall be paid out of the assets in the respective countries, such a direction will not constitute the legacies specific.[1]

A general residuary clause is not the less general because it contains an enumeration of some of the items of which it may consist,[2] and the articles enumerated will not be deemed to be specifically bequeathed.[3]

In case of property specifically bequeathed to two or more persons in succession, it must be retained in the form in which the testator left it, although it may be of such a nature that its value is continually decreasing, as in the case of leaseholds or annuities for the life of a third person,[4] where it might happen that the bounty intended for the subsequent taker might be defeated by the first taker living as long as the term of the lease or annuity lasted.[5]

But where property comprised in a bequest to two or more persons in succession is not *specifically* bequeathed, the Indian Succession Act, following what is known as the rule in *Howe* v. *Lord Dartmouth*,[6] provides that in the absence of any direction to the contrary it shall be sold and the proceeds of the sale invested in such securities as the High Court may, by any general rule to be made from time to time, authorize or direct, and the fund thus constituted shall be enjoyed by the successive legatees according to the terms of the will.[7] In all such cases it is a question of the intention of the testator to be gathered from the whole will; and unless some expression can be gathered from the will that the property is not to be enjoyed in its existing state, the rule must be applied.[8] The mere absence of any direction to convert will not preclude the application of the rule.[9] Where, however, there is an indication of intention that the property is to be enjoyed in its existing state, it must be so enjoyed.[10]

[1] *Kirkpatrick* v. *Kirkpatrick*, cited in *Roberts* v. *Pocock*, 4 Ves., 158; Williams on Executors, 1167.

[2] *Pickup* v. *Atkinson*, 4 Hare, 628, *per* WIGRAM, V. C.

[3] Indian Succession Act, s. 133, which applies to Hindus etc. *Taylor* v. *Taylor*, 6 Sim.; *Sutherland* v. *Cooke*, 1 Coll., 498; *Fielding* v. *Preston*, 1 DeG. and J., 438; *In re Tootal's Estate*, L. R., 2 Ch. D., 628; *MacDonald* v. *Irvine*, L. R., 8 Ch. D., 101.

[4] Indian Succession Act, s. 134. This section applies to Hindus etc. under the Hindu Wills Act.

[5] See *Pickering* v. *Pickering*, 4 My. and Cr., 219; and *Thursby* v. *Thursby*, L. R., 19 Eq., 395, where the cases on this subject are collected.

[6] 7 Ves., 137.

[7] Indian Succession Act, s. 135. This section applies to Hindus etc. under the Hindu Wills Act.

[8] *Sutherland* v. *Cooke*, 1 Coll., 498; *Blann* v. *Bell*, 5 DeG., and Sm., 658; *Murton* v. *Markby*, 18 Beav., 196.

[9] *Morgan* v. *Morgan*, 14 Beav., 72, 83.

[10] *Pickering* v. *Pickering*, 4 Myl. and Cr., 304, *per* LORD COTTENHAM.

In England the effect of the later decisions has been to allow small indications of intention to prevent the application of the rule.[1]

I have already referred to the distinction between specific and demonstrative legacies. We have seen that, in general, a legacy payable out of a fund or other property, whether real or personal, is demonstrative,[2] *e. g.*, a legacy of Rs. 1,000 out of the sum of Rs. 2,000 due by A, or of 80 chests of the indigo grown at the factory of R.[3] In all such cases it is considered that there is a fixed, independent, separate and distinct intent to give the legacy, the fund or other property being merely pointed out as the particular fund or property from which it is payable.[4] A bequest of Rs. 10,000 out of the testator's estate of Ramnagar, or charged on his estate of Ramnagar is demonstrative, the gift being a gift of so much money intended for the legatee at all events.[5] A gift, however, of a sum of money, part of the produce of real estate directed to be sold, followed by a gift of the residue of the sale proceeds to others, is substantially a gift of the estate to be sold and divided, and not a gift of legacies with a collateral charge on the estate; and these gifts are specific and will be adeemed if the testator sell the estate in his lifetime.[6]

A bequest of "Rs. 10,000, being my share of the capital embarked in the business of B & Co."[7] or of "£10,000, my present capital in the business of banker at C, hereinbefore given to him, shall be paid to him, my said son A, it being my intention to give him such capital of £10,000, wherever the same may be;" is also demonstrative.[8] The fund or stock on which a demonstrative legacy is charged is merely the primary fund out of which payment of the legacy is to be made, and although it be called in, or be not in existence at the time of the testator's death, the legacy will not fail, but will be payable out of the general assets.[9]

[1] *Morgan* v. *Morgan*, 14 Beav., 82, *per* LORD ROMILLY. As to what will be taken as a sufficient indication in the will to exclude the operation of the rule, see *Thursby* v. *Thursby*, L. R., 19 Eq., 395; *Sutherland* v. *Cooke*, 1 Coll., 498; *Collins* v. *Collins*, 2 M. and K., 703; *Hinves* v. *Hinves*, 3 Hare, 609; *Wearing* v. *Wearing*, 23 Beav., 99; *Skirving* v. *Williams*, 24 Beav., 275; *Porter* v. *Baddeley*, L. R., 5 Ch. Div., 542; *In re Chancellor*, L. R., 26 Ch. D., 42.

[2] *Saville* v. *Blacket*, 1 P. Wms., 777.

[3] Indian Succession Act, s. 137, illustration (*b*).

[4] *Mann* v. *Copeland*, 2 Madd., 223.

[5] Indian Succession Act, s. 137, illustration (*b*); see *Saville* v. *Blacket*, 1 P. Wms., 777; *Fowler* v. *Willoughby*, 2 S. and S., 354.

[6] *Newbold* v. *Roadknight*, 1 R. and My., 677; *per* SIR JOHN LEACH, M. R.; *Page* v. *Leapingwell*, 18 Ves., 463.

[7] Indian Succession Act, s. 137; *Attwater* v. *Attwater*, 18 Beav., 330.

[8] *Sparrow* v. *Josselyn*, 16 Beav., 135; see *Bevan* v. *Attorney-General*, 4 Giff., 361.

[9] *Vickers* v. *Pound*, 6 H. L., Ca., 885; *Gillaume* v. *Adderley*, 15 Ves., 384; see Indian Succession Act, s. 140, which applies to Hindus etc.

Demonstrative legacies are specific in one sense, and general in another; specific, as being given out of a particular fund, and not out of the estate at large; general, as consisting only of definite sums of money and not amounting to a gift of the fund itself or any aliquot part of it.[1] A demonstrative legacy, too, is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets.[2] It is liable to abate, however, when it becomes a general legacy by reason of the failure of the fund out of which it is payable.[3] Where the subject-matter of a specific bequest produces income, the bequest, as already pointed out, carries the income accruing from the date of the testator's death, for the specific legacy vests from the time.[4] A demonstrative legacy, however, does not carry income or interest from the testator's death.[5]

The distinction between demonstrative and other legacies is discussed at great length in the case of *Paget* v. *Huish*,[6] to which reference may be made.

Portion of a fund may be specifically bequeathed and a legacy be directed to be paid out of the same fund, as where the testator bequeaths to A Rs. 1,000, being part of the debt due to him from X, and also directs that out of the same fund Rs. 1,000 should be given to B. Here the legacy to B is clearly demonstrative, while that to A is specific. In such a case the specific legacy must be paid first, and the other out of the residue. If the residue be insufficient the balance of the demonstrative legacy must be paid out of the general assets of the testator.[7]

It is a general rule that in order to complete the title of a specfic legatee to his legacy the thing bequeathed must at the testator's death remain in specie as described in the will,[8] for such a legacy is always liable to what is called ademption by the testator.

Ademption is thus explained by the Indian Succession Act: "If anything which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is adeemed,—that is, it cannot take effect by reason of the subject-matter having been withdrawn from the operation of the will."[9] It is in fact a conse-

[1] *Smith* v. *Fitzgerald*, 3 Ves., and B. 5 *per* GRANT, M. R.

[2] *King* v. *Martin*, 2 Ves. Jun, 640; 2 Wms., 1165.

[3] *Mullins* v. *Smith*, 1 Dr. and Sm., 210; *per* KINDERSLEY, V. C.

[4] Indian Succession Act, s. 309 and Probate and Administrative Act, s. 128; *Jacques* v. *Chambers*, 2 Coll., 435, 440.

[5] *Mullins* v. *Smith*, 1 Dr. and Sm., 204, 210. Intestate and Testamentary Succession in India, p. 172-3.

[6] 1 Hem., and Mil., 663;

[7] Indian Succession Act, s. 138. This section applies to Hindus etc.

[8] 2 Williams on Executors, p. 1326.

[9] Indian Succession Act, s. 139. This section also applies to Hindus etc.

quence of the very nature of a specific legacy that this effect takes place. If the subject-matter of the legacy is only partially extinguished there will be only a partial ademption.[1] The principle of ademption does not apply to demonstrative legacies,[2] for on failure of the fund out of which they are payable, they are to be paid out of the general estate.

Although all cases of ademption arise from a supposed alteration of the intention of the testator,[3] it has been said that the only rule to be adhered to is to see whether the subject of the specific bequest remained in specie at the time of the testator's death, as the idea of discussing the particular motives and intention of the testator in each case in destroying the subject of the bequest would be productive of endless uncertainty and confusion.[4] Thus, if stock is specifically bequeathed the legacy will be adeemed, if it is not in existence at the testator's death.[5]

A bequest of all the testator's stock is specific, but stock not purchased, but directed to be purchased merely, will not pass under such a legacy, for the specific thing must be in existence at the testator's death.[6] There will be an ademption *pro tanto*, if part of the stock specifically bequeathed has ceased to exist.[7] But where stock, which has been specifically bequeathed, is lent to a third person on condition that it shall be replaced, and it is replaced accordingly, the legacy is not adeemed. In England, it seems that a specific legacy of stock is so irretrievably adeemed by the sale of the stock that it cannot be revived by a new purchase of similar stock.[8] In *Partridge* v. *Partridge*,[9] where, however, the legacy was not specific, the testator, who bequeathed 1,000*l.* S. E. stock to B, was, at the time of making the will, possessed of £1,800 of such stock, but he afterwards reduced it to £200, and then again increased it to £1,600. It was held, that the after-purchased stock passed by the will to the legatee. LORD TALBOT said, "if the selling out stock is an evidence to presume an alteration of the intention of the testator, surely his buying in again is as strong an evidence of his intention that the legatee should have it again."[10]

In *Mathews* v. *Foulsham*,[9] the testator, being at the time possessed of £1,000

[1] *Humphreys* v. *Humphreys*, 2 Cox., 185; *Hayes* v. *Hayes*, 1 Keen., 97.

[2] Indian Succession Act, s. 140.

[3] *Partridge* v. *Partridge*, Cases, Temp. Talbot, 227.

[4] *Humphreys* v. *Humphreys*, 2 Cox, 195, *per* LORD TALBOT; Williams on Executors, 1329.

[5] Indian Succession Act, s. 145, which applies to Hindus etc.

[6] *Thomas* v. *Thomas*, 27 Beav., 537; See *Ashburner* v. *MacGuire*, 2 Bro. C. C., 110.

[7] Indian Succession Act, s. 146, which applies to Hindus etc.

[8] 1 Rop. 3; Williams on Executors, p. 1330.

[9] Cases, Temp. Talbot., 227.

[9] See remarks upon this case by LORD HARDWICKE in *Aveleyn* v. *Ward*, 1 Ves. Sen., p. 426. See also *Drinkwater* v. *Falconer*, 2 Ves. Sen., 623.

[10] L. R, 2 Eq., 669.

guaranteed stock in the N. B. Railway, bequeathed to A "my one thousand N. B. Railway preference shares." After the date of his will he sold his N. B. guaranteed stock, but died possessed of shares and stock in the N. B. Railway acquired by several subsequent successive purchases exceeding the amount bequeathed to A. It was held by WOOD, V. C., that the bequest being specific had been adeemed; that a contrary intention, so as to exclude the operation of 1 Vict., c. 16, s. 24, appeared in the will, and that A was not entitled to have his legacy satisfied out of the N. B. shares and stock in the possession of the testator at the time of his death. WOOD, V. C., in referring to the fact that the subsequently purchased stock had not been purchased at one time, said: "This bit-by-bit purchase would not come within the reasoning of LORD HARDWICKE in *Aveleyn* v. *Ward*,"[1] in which Lord Hardwicke discussed the case of *Partridge* v. *Partridge*. The Indian Succession Act, however, is precise as to the effect of a purchase of an equal quantity of similar stock after the sale of stock specifically bequeathed. If the newly purchased stock is in existence at the death of the testator, the legacy is not adeemed.[2] But the stock purchased must be the same as that which had been sold. In *Pattison* v. *Pattison*,[3] where the testator, having made a specific bequest of "£50 long annuities, purchased with £1,000 left by the will of J. T.," sold the long annuities and purchased new annuities, which differed only from the long annuities by being terminable quarter of a year sooner, the legacy was held to be adeemed. A conversion which leaves the bequest in substantially the same estate as it was before, as where shares are converted into stock by a resolution of a Company, will not cause ademption. Thus, in *Oakes* v. *Oakes*,[4] a bequest of all my Great Western Railway shares was held to pass shares in the Great Western Railway Company which the testator had at the time of the will, but which were before his death, by a resolution of the Company, converted into consolidated stock, the change being held to be a mere formal change.[5] So, in *In re Pilkington*,[6] where Railway bonds specifically bequeathed were afterwards converted into shares by a general arrangement with the bond-holders, it was held there was no ademption. In *In re Lane*,[7] however, a testator, having certain debentures at the date of his will, thereby gave "all my debentures" upon certain trusts, and after the date of the will, he exercised an option given to him by the Company which had issued the debentures, and converted them into debenture stock of the

[1] 1 Ves. Sen., 423.

[2] S. 153, which applies to Hindus etc.

[3] 1 My. and Keen, 12.

[4] 9 Hare., 666, 672.

[5] See *Morrice* v. *Aylmer*, L. R., 10 Ch., 148, L. R., 7 H. L., 717.

[6] 6 N. R., 246, cited in *In re Lane*, L. R., 14 Ch. Div., 856.

[7] 14 Ch. D., 856; see *In re Johnstone's Settlement*, *ibid*, 162.

same Company; and it was held that the debenture stock did not pass by the will, HALL, V. C., being of opinion that debenture stock was essentially different from debentures.[1]

There is no ademption where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place by operation of law, or in the course of execution of the provisions of any legal instrument under which the thing bequeathed was held,[2] as where stock specifically bequeathed is changed by Act of Parliament[3] or by Act of the Legislature of India,[4] or where money invested in consols in the names of trustees for the testator is transferred under the settlement into the testator's own name.[5] So, where A bequeaths to B the sum of 10,000 rupees in promissory notes of the Government of India, which he has power, under his marriage-settlement, to dispose of by will, and afterwards, in A's lifetime, the fund is converted into consols by virtue of an authority contained in the settlement, there is no ademption.[6]

A specific bequest, however, of stock standing in the names of trustees will, it has been held in England, be adeemed by a change in the investment.[7] If a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place without the knowledge or sanction of the testator, the legacy will not be adeemed, as where A bequeaths to B "all his three per cent. consols," and the consols are, without A's knowledge, sold by his agent, and the proceeds converted into East India stock.[8] In *Basan* v. *Brundun*,[9] the testator, seven days before his death, had directed his agents in England to invest, in any funds beneficial to the estate, certain sums of money which he had specifically bequeathed. Before receiving the instructions, the agents had, unknown to the testator, already invested the money in 4½ per cents. SHADWELL, V. C., held, that, by this unauthorized act of the agents, there was no ademption. So, where there has been a wrongful conversion of the subject-matter of a specific bequest, without the knowledge or sanction of the testator, by a third person, the bequest is not adeemed.[10]

[1] As to the difference see judgment of JAMES, L. J., in *Attree* v. *Hawe*, L. R., 9 Ch. D., 349.

[2] Indian Succession Act, s. 150, which applies to Hindus etc.

[3] *Partridge* v. *Partridge*, Cases, Temp. Talbot., 227; see *Oakes* v. *Oakes*, 9 Hare, 666.

[4] Indian Succession Act, s. 150, illustration (*a*).

[5] *Ibid.*, illustration (*b*) following the principle in *Lee* v. *Lee*, 27 L. J., Ch., 824; *Dingwall* v. *Askew*, 1 Cox, 427; and *Jones* v. *Southall*, 32 Beav., 31.

[6] *Ibid.*, illustration (*c*).

[7] *Harrison* v. *Jackson*, L. R., 7 Ch. D., 339.

[8] Indian Succession Act, s. 151, which applies to Hindus etc.

[9] 8 Sim., 171.

[10] *Domville* v. *Taylor*, 32 Beav., 604. See *Shaftesbury* v. *Shaftesbury*, 2 Vern., 747. Intestate and Testamentary Succession in India, p. 181.

In general a bequest of goods in a particular place is adeemed by their removal.[1] But such a bequest is not adeemed by a removal from any temporary cause, or by fraud, or without the knowledge or sanction of the testator.[2] Thus, it has been held that removal of a thing specifically bequeathed for temporary purposes, as for repairs,[3] or for safe custody, or preservation from fire, will not operate as an ademption.[4]

In *Heseltine* v. *Heseltine*,[5] the testator bequeathed all his furniture at D and W to his wife, and, after making his will, removed to B, to which he transferred his furniture from D and W. LEACH, V. C., held, that the bequest was adeemed. If, however, property specifically bequeathed be removed from the place where it is stated to be in the will, the removal will not cause ademption, if the place is only referred to in order to complete the description of the subject-matter of the bequest.[6] It must be a question of construction whether a locality referred to is essential to the bequest or is merely descriptive. The nature of the place may be a criterion. Thus, if a legacy be of all the testator's goods on board a particular vessel then lying in the river Hooghly, the reference to the locality is purely descriptive, as the goods could not be intended to remain indefinitely on board the ship, and a removal by the testator's direction of the goods to a warehouse where they are to remain till the testator's death would not operate as ademption.[7] Again, if a testator who is possessed of one set of furniture only, resides alternately in two houses in different places, removing the furniture from one house to the other as occasion requires, gives a legacy of his furniture, the removal from time to time does not revoke the legacy by ademption.[8] In a bequest of all the testator's bills, bonds and other securities "then lying at his lodgings in C" the words referring to locality are clearly descriptive, and, if at the death of the testator his effects have been removed, the legatee will be entitled to the legacy.[9]

Where the thing specifically bequeathed is the right to receive something of value, as a debt or money secured by a bond or mortgage, and it is received by the testator in his lifetime, the legacy is adeemed.[10] Thus, payment of a debt is an

[1] *Green* v. *Symonds*, 1 Bro. C. C., 128, note.

[2] Indian Succession Act, s. 147, which applies to Hindus etc.

[3] *Ld. Brooke* v. *Warwick*, 2 DeG. and Sm., 425; *Cockerell* v. *Earl of Essex*, L. R., 26 Ch. D., 538.

[4] *Domvile* v. *Taylor*, 32 Beav., 604; *Chapman* v. *Hart*, 1 Ves., Sen., 273.

[5] 3 Madd., 276.

[6] Indian Succession Act, s. 148, which applies to Hindus etc.

[7] *Ibid.*, s. 148, illustration (*c*), *Chapman* v. *Hart*, 1 Ves. Sen., 273.

[8] *Ibid.*, illustration (*a*), *Laud* v. *Devaynes*, 4 Bro. C. C., 537.

[9] *Ibid.*, illustration (*b*), *Cunningham* v. *Rous*, 2 Cases, Temp. Talbot, 272; see *Le Grice* v. *Fitch*, 3 Mer., 50.

[10] Indian Succession Act, s. 141. This section also applies to Hindus etc.

ademption of a specific bequest of that debt,[1] unless there be an express direction to the contrary in the will,[2] and it makes no difference whether the testator himself called in the debt, or the debtor have paid it voluntarily.[3] So the receipt of portion of a debt or other thing which the testator is entitled to receive from a third party will operate as an ademption *pro tanto*.[4]

If a portion of an entire fund or stock be specifically bequeathed, the receipt by the testator of a portion of the fund or stock will operate as an ademption only to the extent of the amount so received; and the residue of the fund or stock will be applicable to the discharge of the specific legacy. Thus, if A bequeaths to B one-half of the sum of 10,000 rupees due to him from W, and A in his lifetime receives 6,000 rupees, part of the 10,000 rupees, the 4000 rupees which are due from W to A at the time of his death belong to B under the specific bequest.[5]

Where, however, the thing bequeathed is not the right to receive something of value from a third person, but the money or other commodity which will be received from the third person by the testator himself or by his representatives, the mere receipt of such sum of money or other commodity by the testator will not constitute an ademption; but if he mixes it up with the general mass of his property, the legacy is adeemed. Accordingly, a legacy of whatever sum may be received in respect of the testator's claim against B is not adeemed, if the testator receive the whole amount of the claim and sets it apart from the general bulk of his property.[6]

A portion of a fund may be specifically bequeathed to one legatee, and a legacy charged on the same fund bequeathed to another legatee; in that case, if the testator receives a portion of that fund, and the remainder of the fund is insufficient to pay both the specific and the demonstrative legacy, the specific legacy must be paid first, and the residue (if any) of the fund shall be applied so far as it will extend, in payment of the demonstrative legacy, and the rest of the demonstrative legacy must be paid out of the general assets of the testator.[7] Therefore, where A bequeaths to B 1,000 rupees, part of the debt of 2,000 rupees due to him from W, and also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W, if A afterwards receives 500 rupees,

[1] *Rider* v. *Wager*, 2 P. Wms., 331.

[2] *Earl of Thomond* v. *Earl of Suffolk*, 1 P. Wms., 461.

[3] *Innes* v. *Johnson*, 4 Ves., 568, 574; *Stanley*, v. *Potter*, 2 Cox, 180; see also *Humphreys* v. *Humphreys*, 2 Cox, 185. Intestate and Testamentary Succession in India, p. 175.

[4] Indian Succession Act, s. 142, which applies to Hindus etc.

[5] *Ibid.*, s. 143, which applies to Hindus etc.

[6] Indian Succession Act, s. 149, which applies to Hindus etc. See *Clarke* v. *Brown*, 2 Sm. and Giff., 524; *Lee* v. *Lee*, 27 L. J., Ch., 824; and *Harrison* v. *Jackson*, L. R., 7 Ch. D., 339, where JESSEL, M. R., questioned the decision of STUART, V. C., in *Clarke* v. *Brown*.

[7] Indian Succession Act, s. 144, which applies to Hindus etc.

part of that debt, and dies leaving only 1,500 rupees due to him from W, then of these 1,500 rupees 1,000 rupees belong to B, and 500 rupees are payable to C, but C has also a right to receive 500 rupees out of the general assets of the testator. Here the specific legacy is to be paid at all events, whereas the fund, so far as the demonstrative legacy is concerned, is merely pointed out as the fund from which it is payable in the first instance.[1]

The confirmation by a will or codicil will not revive a legacy which has been adeemed in the meantime.[2]

Under a bequest of something described in general terms, such as a horse, a pair of carriage horses or a diamond ring, the executor must purchase for the legatee what reasonably answers the description of the article.[3] But a bequest of "my pair of carriage horses," which, we have seen, is a specific bequest, will of course fail, if the testator has no carriage horses at the time of his death.[4] In *Evans* v. *Tripp*,[5] SIR JOHN LEACH, V. C. said:—"A gift of 'my grey horse' will pass a black horse, which is not strictly grey, if it be found to have been the testator's intention that it should pass by that description; but if the testator has no horse, the executor is not to buy a grey horse."

In England, the bequest of a specific article, which is in pawn, is held to be a full gift and the executor is bound to redeem it, if the assets of the estate will permit of his doing so.[6] Accordingly, in the case of personal property, where a specific legacy is pledged or charged by the testator, the legatee is entitled to have it redeemed or exonerated by the executor, and if the executor fail to perform that duty, the legatee is entitled to compensation, to the amount of the legacy, against the personal assets of the testator.[7] This is so, whether the pledge or charge be for the debt of the testator himself or not.[8] Under the Indian Succession Act, which applies both to real and personal property, or, to speak more strictly, to both moveable and immoveable property, the law is different. By s. 154 of that Act, where any property specifically bequeathed is subject at the death of the testator to any pledge, lien, or incumbrance created by the testator himself, the legatee, unless a contrary intention appear in the will itself, must, if he accept the bequest, accept it subject to the pledge, lien, or incumbrance. Important questions, therefore, may arise as to what is a sufficient indication

[1] See the case of *Kermode* v. *McDonald*, L. R., 1 Eq., 459.

[2] *Drinkwater* v. *Falconer*, 2 Ves. Sen., 623; see *Hopwood* v. *Hopwood*, 7 H. L., 723, Wms, 1358.

[3] Indian Succession Act, s. 158, which applies to Hindus etc.

[4] *Ibid.*, illustration (*b*).

[5] 6 Madd., 92.

[6] See *Ashburner* v. *MacGuire*, 2 Bro. C. C., 111.

[7] *Knight* v. *Davis*, 3 My. and K., 358, *per* LEACH, M. R.

[8] *Bothamley* v. *Sherson*, L. R., 20 Eq., 304, *per* JESSEL, M R.

of a contrary intention. The section itself goes out to provide that a contrary intention is not to be inferred from any direction which the will might contain for the payment of the testator's debts generally. Previously to 17 and 18 Vict., c. 113, commonly known as Locke King's Act, the rule in England was that the personal estate of a deceased debtor was the primary fund to pay off a mortgage, unless it appeared from the will that the testator intended that the mortgaged property should be the primary fund.[1] By that Statute, however, the devisee of real estate, charged with the payment of any sum of money by way of mortgage, cannot claim payment of the mortgage out of personal assets, unless, as under s. 154 of the Indian Act, the testator shall by his will, deed, or other document have signified any contrary or other intention. It was held that a lien for unpaid purchase-money was not a charge by way of mortgage under the Statute;[2] but under a subsequent Statute,[3] the word 'mortgage' has been extended to include such a lien.[4] The law in England, as enacted by Locke King's Act,[5] with reference to realty, it will be observed, is similar to the general rule laid down by the Indian Succession Act.

The provisions of the Indian Succession Act as to the effect of a general direction to pay debts are in accordance with the decided cases in England, under Locke King's Act. Thus, a general direction in a will that "all just debts be paid as soon as may be," was held not to be a sufficient expression of a contrary intention.[6] It was held in *Woolstencroft* v. *Woolstencroft*,[7] overruling the decision of STUART, V. C., that a direction that all debts, &c., should be paid by the *executors*, followed by a gift of all the testator's real estates, which were subject to a mortgage, to trustees, who were also executors, did not show a contrary intention. While the mere expression of a direction that all the debts should be paid out of the personal estate has been held not to be a sufficient expression of a contrary intention, so as to prevent a devisee of a mortgaged estate taking *cum onere* under Locke King's Act,[8] it seems that a direction to pay debts out of a particular fund is sufficient to show a contrary intention. In *Smith* v. *Smith*,[9] the testator devised a house subject to a mortgage to his daughter, and bequeathed all his personal estate to trustees (of whom his daughter was one), and directed them to pay his debts

[1] *Goodwin* v. *Lee*, 1 K. and J., 377.

[2] *Hood* v *Hood*, 26 L. J., Ch., 616; see *Barnewell* v. *Iremonger*, 1 Dr. and S., 243.

[3] 30 and 31 Vict., c. 69, s. 2.

[4] Intestate and Testamentary Succession in India, p. 183.

[5] 17 and 18 Vict., c. 113, s. 1.

[6] *Pembrooke* v. *Friend*, 1 John. and Hem., 132; *Brownson* v. *Lawrance*, L. R., 6 Eq., 1.

[7] 2 DeG. F. and J., 347.

[8] *Rowson* v. *Harrison*, 31 Beav., 207.

[9] 3 Giff., 263.

thereout, and, *subject thereto*, to divide the residue among his children. STUART, V. C., held, that it was the clear intention of the testator that the mortgage-debt should be paid out of the personal estate. He distinguished the case of *Woolstencroft* v. *Woolstencroft*, by the circumstance that, in the case before him, the devise of the mortgaged estate was to one of the executors who had been plainly directed to pay all the debts out of the personal estate. So, where a testator bequeathed his personal estate to trustees on trust to pay thereout all his debts, &c., and invest the residue upon the trusts therein mentioned, and he disposed of his real estate, part of which was subject to a mortgage, it was held, that the trust for the payment of the testator's debts showed a contrary intention, and that the mortgaged estate ought to be exonerated out of the personalty. In *Mellish* v. *Vallins*,[1] the bequest of personalty "subject to the payment thereout of all the testator's debts," following a devise of land mortgaged, which made no reference to the mortgage, was held to be a sufficient indication of an intention that the land should not be primarily liable to the payment of the mortgage-debt.[2] In *Newman* v. *Wilson*,[3] the devisee of a mortgaged estate was held entitled to have the mortgage paid out of the other real and personal estate devised for payment of debts.[4]

In *Brownson* v. *Lawrance*,[5] where the owner of an equity of redemption of two estates comprised in the same mortgage specifically devised one estate and left the other to pass by a residuary devise, it was decided by LORD ROMILLY, that he thereby signified a contrary intention, which made the residuary devise primarily liable for the whole of the mortgage. In *Gibbins* v. *Eyden*,[6] MALINS, V. C., points out that that case proceeded on the ground that a residuary devise was not specific. That such a devise is specific has been laid down, in *Hensman* v. *Fryer*[7] and in *Bothamley* v. *Sherson*.[8] *Brownson* v. *Lawrance* was also questioned, if not actually overruled, in *Sackville* v. *Smyth*,[9] by JESSEL, M. R.

In cases where a particular fund is declared liable for the payment of debts or encumbrances, the devisee of a mortgaged estate is only entitled to be exonerated so far as that fund goes.[10]

[1] 2 John. and Hem., 194.

[2] See *Eno* v. *Tatham*, 3 DeG. J. and Sm., 443.

[3] 31 Beav., 33.

[4] See *Maxwell* v. *Maxwell* L. R., 4 H. L., 506. Intestate and Testamentary Succession in India, p. 184.

[5] L. R., 6 Eq., 1.

[6] L. R., 7 Eq., 374.

[7] L. R., 2 Eq., 627.

[8] L. R., 20 Eq., 304.

[9] L. R., 17 Eq., 153.

[10] *Rodhouse* v. *Mold*, 35 L. J., Ch., 67.

Now, in England, as under the Indian Succession Act, it is enacted,[1] as to wills made after 31st December, 1867, that "a general direction that the debts or all the debts of a testator shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to, or other than the rule established by Locke King's Act,[2] unless such contrary or other intention shall be further declared by words expressly or by neccessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate."[3] As to this enactment, GIFFARD, V. C., said,—"The meaning of that appears to be this, that if a testator wishes to give a direction, which shall be deemed a declaration of an intention contrary to the rule laid down by Mr. Locke King's Act, it must be a direction applying to his mortgage debts in such terms as distinctly and unmistakably to refer to, or describe them."[4]

Section 154 of the Indian Succession Act, it is to be observed, refers only to pledges, liens, or incumbrances created by the testator himself, and a periodical payment in the nature of land-revenue or in the nature of rent is declared not to be an incumbrance within the meaning of the section.[5] In England, a distinction was made between charges created by the testator himself and liabilities incident to the thing bequeathed. From the former, the legatee in England was entitled to exoneration.[6] In England by s. 2 of the Apportionment Act,[7] "all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." And under that Statute, MALINS, V. C., held, that there must be an apportionment between the executor and the devisee of the rent of an estate devised by the testator.[8] Rents accruing due after the testator's death are payable by the legatee.[9]

By section 156 of the Indian Succession Act where there is a bequest of any interest in immoveable property, in respect of which payment in the nature of land-revenue, or in the nature of rent, has to be made periodically, the estate

[1] By Statute 30 and 31 Vict., c. 69, s. 1.

[2] 17 and 18 Vict., c. 113.

[3] See Statute 40 and 41 Vict., c. 34.

[4] *Nelson* v. *Page*, L. R., 7 Eq., 25, 28.

[5] See Explanation appended to the section. The section applies to Hindus etc.

[6] Intestate and Testamentary Succession in India, pp. 184, 185.

[7] 33 and 34 Vict., c. 35.

[8] *Capron* v. *Capron*, L. R., 17 Eq., 288.

[9] *Fitzwilliams* v. *Kelly*, 10 Hare, 266; see *Hawkins* v. *Hawkins*, L. R., 13 Ch. D., 470. Intestate and Testamentary Succession in India, p. 186.

of the testator shall (as between such estate and the legatee) make good such payments, or a proportion of them, up to the day of his death.

The principle upon which immoveable property is exonerated is applied by section 157 of the Indian Succession Act to the case of specific bequests of stock in joint stock companies.[1] By that section, in the absence of any direction to the contrary, if any call or other payment is due from the testator at the time of his death in respect of such stock, such call or payment shall, as between the testator's estate and the legatee, be borne by such estate; but if any call or other payment shall, after the testator's death, become due in respect of such stock, the same shall, as between the testator's estate and the legatee, be borne by the legatee, if he accepts the bequest.

If after a legacy of shares in a joint stock company has been accepted, the affairs of the company are wound up and each shareholder is called upon for a contribution, the amount of contribution must be borne by the legatee.[2] But a legatee of shares takes all benefits and advantages accruing by reason of their possession,—*e. g.*, a right to compensation in consequence of alleged concealment or misrepresentation on the part of the company.[3] It is a rule, also, that a specific legacy carries with it all the income and profits which may accrue upon it after the testator's death.[4]

The rule in England as to exoneration of shares specifically bequeathed, as laid down in *Day* v. *Day*,[5] is, that where shares in joint stock companies are specifically bequeathed, the legatee is liable to pay all calls made after the testator's death, but is entitled to have all unpaid calls which, at the testator's death, were necessary to make him a complete shareholder, borne by the estate.[6] The cases in England are, it will be found, conflicting, but the rule in *Day* v. *Day*,[7] seems now to be followed.[8] Under the Indian Succession Act, only such calls or other payments as are due at the time of the testator's death are to be borne by the estate,[9] but if anything is to be done to complete the testator's title to the thing bequeathed, it is to be done at the cost of the testator's estate.[10] Accordingly, if the purchaser of real estate dies without having paid the purchase-money, his heir-at-law, or the devisee of the land purchased, will be entitled

[1] Sections 156 and 157, apply to Hindus etc.

[2] Indian Succession Act, s. 157, illustration (*d*).

[3] *Carron Co.* v. *Hunter*, L. R., 1 Sc. App., 362.

[4] *Maclaren* v. *Stainton*, 3 DeG. F. and J., 202.

[5] 1 Dr. and Sm., 261.

[6] See *Addams* v. *Ferick*, 26 Beav., 384, and *Armstrong* v. *Burnet*, 20 Beav., 424, where LORD ROMILLY reviewed the cases on this subject.

[7] *Supra.*

[8] See *In re Box*, 1 H. and M., 552, *per* PAGE WOOD, V. C.

[9] Intestate and Testamentary Succession in India, pp. 187, 188.

[10] Indian Succession Act, s. 155. This section applies to Hindus etc.

to have the estate paid for by the executor or administrator.[1] So, where the vendor has a good title, the devisee, if he pay for the estate, may call upon the executor to reimburse him from the personal estate.[2]

It has been held in England that if a contract to purchase land be dissolved merely on account of the inability of the executors to complete it owing to the insufficiency of the personal estate left by the testator, the devisee of the lands agreed to be purchased may, in the event of assets subsequently coming in, compel the executors to apply the amount of the purchase-money to the purchase of other lands to be settled to the same uses.[3] Where, however, a good title cannot be made out, the devisee of the lands agreed to be purchased will not be entitled to the amount of the purchase-money.[4] In such a case, it was said, "the Court cannot speculate upon what the deceased party would have done; but in these cases the inquiry must be whether, at his death, a contract existed by which he was bound, and which he would be compelled to perform.[5] That alone can give the heir of the purchaser (or the devisee) a right to call for the personal estate to be applied."[6] So, in the case of stock or shares, where the testator has contracted to pay certain sums in respect of shares which he has agreed to take in a particular company payments due at his death must be paid by his general estate.[7]

We have already seen that where property is bequeathed to any person, he is entitled to the whole interest of the testator in such property, unless it appears from the will itself that only a restricted interest was intended for him.[8] An extension of this principle has been applied by s. 159 of the Indian Succession Act in cases where the interest or produce of a fund is the subject of a legacy. In such a case, if the will affords no indication that the enjoyment of the bequest should be of limited duration the principal as well as the interest will belong to the legatee.[9] It is to be observed that s. 159 of the Indian Succession Act speaks only of "the interest or produce of a fund," but illustration (*e*) to that section makes it clear that it was intended by the Legislature that it should

[1] *Milner* v. *Mills*, Mosely, 123; *Broome* v. *Monck*, 10 Ves., 597; Williams on Executors, 1769.

[2] *Broome* v. *Monck*, 10 Ves., 614, 615.

[3] *Whittaker* v. *Whittaker*, 4 Bro. C. C., 30.

[4] *Green* v. *Smith*, 1 Atk., 572; *Broome* v. *Monck*, 10 Ves., 597.

[5] See *Curre* v. *Bowyer*, 5 Beav., 6 (note).

[6] Williams on Executors, 1770.

[7] See *Day* v. *Day*, 1 Dr. and Sm., 261; *Addams* v. *Ferick*, 26 Beav., 384. Indian Succession Act s. 157. Intestate and Testamentary Succession in India, pp. 185, 186.

[8] *Supra*, p. 173.

[9] Indian Succession Act, s. 159. This section applies to Hindus etc.

have reference, not only to what may be strictly described as a fund, but also to land producing rents,[1] and it was actually so held in a recent case.[2] In England, also, a devise of the income of lands has been held to pass the fee,[3] but before the Wills Act, under a devise of "the rents and profits" to A, without words of limitation, an estate for life only passed.

Under a bequest to A of "the interest of my 4 per cent. promissory notes of the Government of India," if there is no other clause in the will affecting those securities, A will be entitled to the testator's promissory notes.[4] But if the bequest were to A for life and after his death to B, A would be entitled to the interest of the notes for life, and B upon his death would take them absolutely.[5]

In *Bent* v. *Cullen*,[6] the testator gave to his wife £50 a year to be paid out of the interest, dividends, and produce arising from his personal property, and he gave, after her decease, the said £50 to his two daughters and his granddaughter, or the survivors. It was held, that there was a gift to the survivors of the principal, which would produce the annuity of £50.[7] In *Elton* v. *Sheppard*,[8] a gift of personalty to trustees to pay the interest to A, without any other words of limitation, was held an absolute gift of the principal.[9] So an indefinite gift of dividends has been held to pass the absolute property of stock.[10] In *Southouse* v. *Bate*,[11] a bequest of the dividends of a sum of stock to a woman for her separate use, with a direction that she might dispose of it by will, was held to be an absolute gift with a superadded power to dispose of it, which did not derogate or detract from the prior absolute gift.

Although the general rule is, that an unqualified gift of the income of a fund vests an absolute and not merely a life-interest in the fund, it is always a question of construction whether or not the testator's intention was to give more than a life-interest.[12] An intention that the enjoyment of the bequest

[1] That illustration is as follows: "A bequeaths to B the rents of his lands at X. . B is entitled to the lands."

[2] *Hemangini Dassi* v. *Nobin Chunder Ghose*, 4 C. L. R., 370.

[3] *Mannox* v. *Greener*, L. R., 14 Eq., 456.

[4] Indian Succession Act, s. 150, illustration (*a*); *Stretch* v. *Watkins*, 1 Madd., 253.

[5] *Ibid.*, illustration (*b*); see *Gravenor* v. *Watkins*, L. R., 6 C. P., 500.

[6] L. R., 6 Ch., 235.

[7] See *Stokes* v. *Heron*, 2 Dr. and War., 89; (S. C.), 12 Cl. and Fin., 161; and *Kerr* v. *Middlesex Hospital*, 2 DeG. M. and G., 576. See also s. 28 of the English Wills Act, 1 Vict., c. 26 and s. 82 of the Indian Succession Act.

[8] 1 Bro. C. C., 531.

[9] See *Hawkins* v. *Hawkins*, 7 Sim., 173.

[10] *Per* GRANT, M. R., *in Page* v. *Leapingwell*, 18 Ves., 467.

[11] 16 Beav., 133.

[12] *Per* PARKER, V. C., *Blann* v. *Bell*, 5 DeG. and Sm., 663.

should be of a limited duration in case of lands, will not be inferred from the fact that in other parts of the will words of inheritance had been used in other devises.[1] Nor will such an intention be inferred where a power is given to the devisee to appoint the property generally, if the devise has been made without words of limitation.[2] When, however, by the same will an estate is subsequently given which cannot come into existence unless a prior devise be construed to be a life-estate, the first devisee will take a life-interest only.[3]

As pointed out by LORD COTTENHAM,[4] there is a marked distinction between the gift of the produce of a fund without limit as to time and a simple gift of an annuity. An annuity may be perpetual, or for life, or for any period of years; but, in the ordinary acceptation of the term used, if it should be said that a testator had left another an annuity of 100*l.* per annum, no doubt would occur of the gift being an annuity for the life of the donee.[5] That being so we find a very different principle applied in the case of annuities. The rule in India is, that unless a contrary intention appears by the will the legatee is entitled to receive an annuity for life only, and this rule is not varied by the circumstance that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it.[6] While, however, *primâ facie*, a gift of an annuity is for life only,[7] there may be circumstances affecting the construction, sufficient to show an intention to give the annuity indefinitely.[8] Thus, where there are limitations inconsistent with a mere life-interest, the annuity is perpetual.[9]

In England, where there is a gift of an annuity, not out of property generally, but out of property to produce it, the annuity is perpetual.[10] In *Wilson* v. *Maddison*,[11] a distinction was drawn between £30 a year charged on, and £30 a year part of, certain stock. In *Rawlings* v. *Jennings*,[12] where the bequest was of "£200 a

[1] *Wisden* v. *Wisden*, 2 Sm. and Giff., 396.

[2] See *Brooke* v. *Brooke*, 3 Sm and Giff., 280.

[3] *Gravenor* v. *Watkins*, L. R., 6 C. P., 500.

[4] *Blewitt* v. *Roberts*, 1 Cr. and Ph., 280

[5] Indian Succession Act, s. 160. Intestate and Testamentary Succession in India, p. 189. Section 160 of the Indian Succession Act applies to Hindus etc.

[6] Indian Succession Act, s. 160.

[7] *Blewitt* v. *Roberts*, 10 Sim. 491; *Blight* v. *Hartnoll*, L. R., 19 Ch. D., 294.

[8] *Potter* v. *Baker*, 15 Beav., 492, *per* ROMILLY, M. R.

[9] *Mansergh* v. *Campbell*, 3 DeG. and J., 237.

[10] *Kerr* v. *Middlesex Hospital*, 2 DeG. M. and. G., 576; *Ross* v. *Borer*, 2 J. and H., 469; see *Stokes* v. *Heron*, 12 Cl. and Fin., 161; *Rawlings* v. *Jennings*, 13 Ves., 39; *Stretch* v. *Watkins*, 1 Madd., 253; *Clough* v. *Wynne*, 2 Madd., 188; *Hickes* v. *Ross*, L. R., 14 Eq., 141. Intestate and Testamentary Succession in India, p. 191.

[11] 2 Y. and Coll., Ch. Ca., 372.

[12] 13 Ves., 39.

year, part of the monies I now have in bank securities;" and in *Stretch* v. *Watkins*,[1] where the bequest was of "£200 per annum,—that is to say, the interest of £4,000 of my 5 per cent. annuities," the annuities were held to be perpetual.[2] But in India the mere circumstance that a sum of money is bequeathed to be invested in the purchase of an annuity will not make it perpetual.[3]

If a will clearly establishes a perpetual annuity, the estate in the annuity cannot be restricted by a codicil to a life-estate, unless the expressions there used are clear and undoubted.[4] In the case of *Stokes* v. *Heron*[5] the testator gave an annuity out of personal estate to A during the life of his executor. On A's death in the lifetime of the executor, it was held, that the annuity did not cease, but went to A's executors.

In England, a direction to invest a sum in Government securities sufficient to produce an annuity of a certain sum will give the legatee of such annuity a life-interest only.[6] In *Kerr* v. *Middlesex Hospital*,[7] the testator gave certain annuities in the following terms:—"I desire that my executors shall purchase annuities for each of my two sisters, E. B. and E. F., of £100 a year," and it was held, that the annuities were perpetual, but there the testator had in similar terms also given an annuity to the Middlesex Hospital, and this circumstance was some evidence that the testator meant all the annuities to be perpetual.[8] It is, however, difficult in principle to see the distinction between a gift of an annuity and a direction to purchase an annuity.

The fact that the testator makes an apportionment of a requisite portion of personalty to make a fund for the purchase of annuities, is held, in England, to indicate a contrary intention.[9] Thus, where the testator made a bequest to his wife of "£200 per year, being part of the monies I now have in bank security," it was held, that the wife took an absolute interest in the bank stock.

An annuity for education and maintenance is for life, and not for minority only,[10] and if such an annuity be given for a particular period, as for the life of a certain person, the annuity will not be determined by the death of the annuitant before the expiration of the period fixed, for it has never been doubted, it has been said, that a gift of an annuity for a term, or *pur autre vie*, is a

[1] 1 Madd., 253.

[2] See *Bent* v. *Cullen*, L. R., 6 Ch., 235; *Evans* v. *Walker*, L. R., 3 Ch. D., 211; Williams on Executors, 1201. See also *Lett* v. *Randall*, 2 DeG. F. and J, 388.

[3] Indian Succession Act, s. 160. This section applies to Hindus etc.

[4] *Stokes* v. *Heron*, 12 Cl. and Fin., 161.

[5] 12 Cl. and Fin. 161.

[6] *Re Grove's Trusts*, 1 Giff, 74; *Arnold* v. *Kayers*, 51 L. J., Ch., 721.

[7] 2 DeG. M. and G., 576.

[8] See *Ross* v. *Borer*, 2 John. and Hem., 470.

[9] *Stokes* v. *Heron*, 12 Cl. and F., 161; see *Lett* v. *Randall*, 2 DeG. F. and J., 388.

[10] *Wilkins* v. *Jodrell*, L. R., 13 Ch., 564; *Soames* v. *Martin*, 10 Sim., 287.

gift to the annuitant and his personal representatives during the term or the life of the *cestui que vie*.[1]

If there is a direction in the will that an annuity is to be provided out of the proceeds of property, or out of property generally, or if money is bequeathed to be invested in the purchase of an annuity for any person, on the testator's death the legacy vests in interest in the legatee, and he is entitled at his option to have an annuity purchased for him, or to receive the money appropriated for that purpose by the will.[2] This is an application of the general principle which is applied where there is a gift for a particular purpose. If the purpose of a gift is for the sole benefit of the legatee himself, he can claim the gift without applying it to the purpose. Thus, where a sum of money is bequeathed to purchase for any person a ring,[3] or a house,[4] the legatee may claim the money,[5] the claim of the legatee in all such cases being based, as we have seen, on the rule that equity will not compel to be done that which the legatee may undo the next moment.[6] A direction that the value of the annuity is not to be paid to the legatee is inoperative and will not get over the rule of equity. In *Stokes* v. *Cheek*,[7] ROMILLY, M. R., in such a case, directed the price of the annuity to be paid over to the annuitant, observing: "It is a useless form to direct a purchase if the annuity is to be sold again.[8] The rule is the same whether the bequest be of a specified sum to purchase an annuity, or a direction to purchase an annuity of a specified amount.[9]

In cases where there is a gift over in case the legatee alienates or becomes bankrupt, and the legatee dies before the money directed to be laid out in the purchase for him is so laid out, or before the fund is available,[10] there is a conflict of authority. In *Day* v. *Day*,[11] there was a direction, after the death of the tenant-for-life, to lay out one-seventh of the estate for the life of Charles Day, and to pay such amount, when and as the same should become payable, not by anticipation, to Charles Day for his life, for his own use, and a declaration that, in case Charles Day should have assigned, encumbered, or in any manner

[1] *In re Ord; Dickenson* v. *Dickenson*, 12 Ch. D., 22, *per* JAMES, L. J.

[2] Indian Succession Act, 161, which applies to Hindus etc.; see *Palmer* v. *Crawford*, 3 Swanst., 482; *Bayley* v. *Bishop*, 9 Ves., 6.

[3] *Apreece* v. *Apreece*, 1 V. and B., 364.

[4] *Knox* v. *Hotham*, 15 Sim., 82.

[5] See 1 Jarm., 396; *Dawson* v. *Kearn*, 1 R. and My., 606; *Re Brown's Will*, 27 Beav., 324.

[6] See 1 Jarm., 368.

[7] 29 L. J., Ch., 922.

[8] See *Ford* v. *Batley*, 17 Beav., 303; *Campbell* v. *Brownrigg*, 1 Ph., 301.

[9] *Yates* v. *Compton*, 2 P. W., 308; 1 Jarm., 396, note (*s*).

[10] *Bayley* v. *Bishop*, 9 Ves., 6.

[11] 22 L. J., Ch., 878, 881.

disposed of or anticipated, or should, at any time, dispose of or anticipate the annuity to be purchased, or in case he should at any time, either before or after the testator's death, become bankrupt, the trustees should hold the annuity in trust for other persons. It was held that the legacy being vested passed to the representatives of the legatee. In *Power* v. *Hayne*,[1] MALINS, V. C., refused to follow *Day* v. *Day*. In the case before him, the testator directed his executors, after the death of his wife, to invest one-sixth of his residuary estate in the purchase of an annuity during the life of J. P., and to pay the annuity to J. P. for his support and maintenance; and in case J. P. should anticipate, assign, charge or encumber the annuity, or become a bankrupt or insolvent, the testator directed that that annuity should go to his other residuary legatees. J. P. died in the lifetime of the testator's widow, without having assigned or encumbered the annuity, or become bankrupt or insolvent. MALINS, V. C., held, that there was an intestacy as to one-sixth of the residuary estate on the death of the widow. The ground on which MALINS, V. C., refused to follow *Day* v. *Day* was, that if the trustees of the will had paid over the money, and afterwards the legatee had become bankrupt, they would have had to pay it over again, and that the intention of the testator would have been defeated.

In accordance with the law in England, as laid down in *Hume* v. *Edwards*[2] and other cases, the Indian Succession Act provides that where an annuity is bequeathed, but the assets of the testator are not sufficient to pay all the legacies given by the will, the annuity must abate in the same proportion as the other pecuniary legacies given by the will.[3] In *Miller* v. *Huddlestone*,[4] the rule was thus explained by LORD COTTENHAM :—" The reason is, that the testator, in the absence of clear and conclusive proof to the contrary, must be deemed to have considered that his estate would be sufficient, and consequently not to have thought it necessary to provide against a deficiency by giving a priority, in case of a deficiency, to some of the objects of his bounty." The principle will equally apply whether the annuity is to commence immediately on the death of the testator, or at a future period.[5]

In cases where abatement becomes necessary, the annuity ought to be valued, and the annuitant will be entitled at once to the amount of the valuation, subject to an abatement in proportion to the abatement of the pecuniary legacies.[6] The value is, in England, ascertained thus : If all the annuitants be

[1] L. R., 8 Eq., 262.

[2] 3 Atk., 693 ; *Lewin* v. *Lewin*, 2 Ves. Sen., 417.

[3] Indian Succession Act, s. 162. This section applies to Hindus etc.

[4] 3 Mac. and G., 523.

[5] *Nickisson* v. *Cockill*, 9 Jur., N. S., 975.

[6] *Wroughton* v. *Colquhoun*, 1 DeG. and Sm., 36 and 357 ; Williams on Executors, 1373, note (*f*).

living at the period of division, the value must be ascertained at the death of the testator. If they be all dead, the value must be taken to be the respective amounts of arrears; but if some be dead and others living, the value, as to the former, will be taken at the amount of their arrears, and as to the latter, at the amount of their arrears added to the calculated value of the future payments.[1] In the case of a reversionary annuity which has come into possession, the value must be taken to be the present value of the annuity added to the amount of arrears due since it came into possession.[2]

No distinction is made by the Indian Succession Act, between annuities payable on the death of the testator and annuities to be paid at some future time. For the purpose of abatement annuities are treated as general legacies.[3] Annuities must abate also among themselves.[4] Where there is a gift of an annuity and a residuary gift, the whole of the annuity is to be satisfied before any part of the residue is paid to the residuary legatee, and, if necessary, the capital of the testator's estate is to be applied for that purpose.[5] In *Croly* v. *Weld*,[6] TURNER, L. J., said that the general rule is, that if there be a clear gift of a life-interest and of a reversion, and the estate proves insufficient, each party, the tenant-for-life and reversioner, must bear the loss in proportion to his interest; but that if there is a gift of an annuity and a residuary gift, the annuity takes precedence and the whole loss falls on the residuary legatee, the reason being that a residuary legatee is entitled to nothing until the general legacies given by the will are fully satisfied;[7] and annuities, in case of a deficiency of assets, rank with general or pecuniary legacies.[8]

If no time is fixed for the commencement of an annuity given by will, it will commence from the testator's death, but the first payment is to be made at the expiration of a year next after that event.[9] If there is a direction that it shall be paid quarterly or monthly, the first payment shall be due at the end of the first quarter or first month, as the case may be, after the testator's death,

[1] *Todd* v. *Bielby*, 27 Beav., 353.

[2] *Potts* v. *Smith*, L. R., 8 Eq., 683. Intestate and Testamentary Succession in India, p. 194.

[3] *Innes* v. *Mitchell*, 9 Ves., 212. Indian Succession Act, s. 291, Act V of 1881, s. 112.

[4] *Innes* v. *Mitchell*, 2 Phill. Ch. C., 346.

[5] Indian Succession Act, s. 163.

[6] 3 DeG. M. and G., 995.

[7] *Croly* v. *Weld*, 3 DeG. M. and G., 993.

Indian Succession Act, ss. 162, 291; Act V of 1881, s. 112; *Miller* v. *Huddlestone*, 3 Mac. and G., 523. See Williams on Executors, 1366 *et seq*; *In re Lyne's Trusts*, L. R., 8 Eq., 482; *In re Tootal's Estate*, L. R., 2 Ch. D., 628; *Baker* v. *Farmer*, L. R., 3 Ch., 537.

[9] Indian Succession Act, s. 298; Act V of 1881, s. 118; see *Gibson* v. *Proth*, 7 Ves., 967; *Fearns* v. *Young*, 9 Ves., 553.

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but the executor is not bound to pay it till the end of the year, unless he think fit to pay it when due.[1] Where there is a direction that the first payment of an annuity shall be made within one month, or any other division of time, from the death of the testator, or on a day certain, the successive payments are to be made on the anniversary of the earliest day on which the will authorizes the first payment to be made; and if the annuitant should die in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative.[2]

Where no fund is charged with the payment, or appropriated by the will to answer an annuity, the Indian Succession Act provides that a Government annuity of the specified amount shall be purchased, or, if no such annuity can be obtained, then a sum sufficient to produce the annuity shall be invested for that purpose in such securities as the High Court may, by any general rule to be made from time to time, authorize or direct.[3]

It is a rule in the English Courts of Equity, that where a debtor bequeaths to his creditor a legacy equal to, or exceeding the amount of his debt, it shall be presumed, in the absence of any intimation of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt,[4] but that where the legacy is of less amount than the debt, it shall not be deemed a part payment in satisfaction.[5] The rule, however, though it has long prevailed, has met with the censure of several eminent Judges, and the Courts in England have inclined to lay hold of any minute circumstances whereupon to ground an exception to it.[6]

The Law Commissioners in their report on the Bill which eventually became the Indian Succession Act, say, "Here, as elsewhere, we have departed from the English law, where its provisions appeared to us to be objectionable in themselves, or especially inapplicable to India. Above all things, we have aimed at giving effect to the plain meaning of the words of the testator, without endeavouring to do, or say for him, that which he has not done, or said, for himself. We have accordingly discarded the rules by which the English Courts are compelled to presume, in the absence of any intimation to the contrary,

[1] *Ibid.*, s. 299; Act V of 1881, s. 119: see *Storer* v. *Prestage*, 3 Madd., 167; *Houghton* v. *Houghton*, 1 Sim. and Stu., 390.

[2] *Ibid.*, s. 300; Act V of 1881, s. 121.

[3] *Ibid.*, s. 303. Act V of 1881, s. 123.

[4] Williams on Executors, 1302. *Fowler* v. *Fowler*, 3 P. Wms., 353.

[5] *Ibid.*, note (*m*); *Cranmer's Case*, 2 Salk., 508; *Eastwood* v. *Vinke*, 2 P. Wms., 614; *Gee* v. *Liddell*, 35 Beav., 621.

[6] *Ibid.*, 1303-3. As to the English law, a full account of it will be found in Williams on Executors, p. 1302, *et seq.*, and in Theobald on Wills, p. 546.

that where a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt, the legacy is meant by the testator to be a satisfaction of the debt; that where a parent, who is under a legal obligation to provide a portion for his child, fails to do so, and afterwards bequeaths a legacy to the child, the legacy is meant to be a satisfaction or fulfilment of the obligation. We have, in like manner, discarded the rule of English law, that where a father bequeaths a legacy to a child and afterwards advances a portion for that child, he thereby adeems the legacy. We have endeavoured so to frame the law in this respect as to prevent the occasion from ever arising, which in England requires a nice balancing of judgment, a large discretion the prosecution of a difficult inquiry, and the admission of parol evidence of the intentions of the testator."[1]

So far as bequests to creditors are concerned the suggestions of the Commissioners are carried into effect by s. 164 of the Indian Succession Act, which provides that where a debtor bequeaths a legacy to his creditor, and it does not appear from the will that the legacy is meant as a satisfaction of the debt, the creditor shall be entitled to the legacy as well as to the amount of the debt. In India, therefore, a creditor to whom a legacy is given is *primâ facie* entitled to the legacy as well as the amount of the debt.

In England, where portions are payable under a settlement, or otherwise, by a parent or other person in *loco parentis* there is a presumption, in the absence of anything to the contrary in the will, that a legacy is intended to be in satisfaction of, and not in addition, to, the portion.[2] The Indian Succession Act, however, has discarded the presumption in favour of satisfaction and provided that the portioner shall *primâ facie* be entitled to both the portion and the legacy. Section 165 of that Act provides that where a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy as well as the portion. Thus, if A, by articles entered into in contemplation of his marriage with B, covenanted that he would pay to each of the daughters of the intended marriage a portion of 20,000 rupees on her marriage, and subsequently, this covenant having been broken, A bequeaths 20,000 rupees to each of the married daughters of himself and B, the legatees are entitled to the benefit of his bequest in addition to their portions.

Again, while in England, where a parent gives a legacy to a child and afterwards, on the marriage of the child, or on any other occasion, makes a provision for it, that provision will be presumed to be, if equal or greater, a complete

[1] *Gazette of India*, July 1st, 1864, p. 54.

[2] *Jesson* v. *Jesson*, 2 Vern., 255; *Campbell* v. *Campbell*, L. R., 1 Eq., 383.

satisfaction, if less, a satisfaction *pro tanto*, of the legacy,[1] under the Indian Succession Act no bequest is either wholly or partially adeemed or satisfied by any subsequent provision made by settlement, or otherwise, upon the legatee. The reasons for the departure from the English law have already been referred to in the extract which I have quoted from the report of the Law Commissioners.[2]

A testator is not entitled to dispose by his will of property which does not belong to him. But, by virtue of what is known as the doctrine of election, he may in effect dispose by his will of the property of others.

The doctrine of election applies only to cases when a testator by his will professes to dispose of something which belongs to another, and which he has therefore no right to dispose of, and also gives some benefit to the person to whom the thing belongs. The person to whom the benefit is given has to elect whether he will confirm the disposition or dissent from it, but if he elect to dissent from it, he must give up any benefit provided for him by the will.[3] The doctrine has been thus stated and explained: He who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights.[4] In other words, a person cannot take under and against the same instrument.[5] The doctrine, it may be observed, is not confined to wills, but embraces settlements and other dispositions.[6]

If a testator having a partial interest in a property disposes of the whole to the owner of the part, the doctrine of election applies, and the legatee must elect.[7]

[1] See *In re Pollock*, L. R., 28 Ch. D., 552.

[2] *Supra*, p. 302. As to the English law relating to bequests to portioners, see Wms., pp. 1306 and 1326, *et seq.*

[3] Indian Succession Act, s. 167. This section applies to Hindus etc.

[4] 1 Jarm., 443; Williams on Executors, 1447; see *Rogers* v. *Jones*, 3 Ch. D., 688.

[5] See *Dillon* v. *Parker*, 1 Swan., 359, and notes at pp. 381 and 394 of that report; *Miller* v. *Thurgood*, 33 Beav., 496; *Bow* v. *Barrett*, L. R., 3 Eq., 244.

[6] *Green* v. *Green*, 2 Mer., 86; *Bacon* v. *Cosby*, 4 DeG. and Sm., 261. Intestate and Testamentary Succession in India, p. 197.

[7] *Miller* v. *Thurgood*, 33 Beav., 496; see *Wilkinson* v. *Dent*, L. R., 6 Ch., 339.

There is no distinction for the purposes of election between personal estate and real estate, between specific and residuary legatees, or between legatees and the next-of-kin of an intestate.[1] The doctrine of election applies to interests immediate, remote, contingent,[2] or of value or not of value;[3] but it is only applicable as between a gift under a will and a claim *dehors* the will and adverse to it, not as between one clause in a will and another clause in the same will.[4] Thus, there is no election, where under the same will a legatee takes several legacies, some of which are onerous,[5] unless, it seems, there appear a contrary intention on the face of the will.[6] In *Cooper* v. *Cooper*,[7] a lady having a power of appointment over a fund, did in her lifetime appoint the fund among her three sons equally. By her will she devised the fund to her eldest son, and, one of her sons having died intestate, gave benefits out of her own property to the other surviving son and the children of the deceased son. It was held, that the younger surviving son and the children of the deceased brother were put to their election.[8] The proper course for ascertaining the value of such an interest it was held, was to apportion all the debts and all the administration expenses of the intestate over the whole of the assets of the intestate rateably, and in that way to find what proportion of the debts and expenses the particular property ought to bear.[9]

It is immaterial both under the English law and the Indian Succession Act, whether the testator or donor does, or does not know that he has no right to dispose of the property in respect of which the election takes place.[10]

In England, a question has been much discussed whether the principle governing cases of election under a will is forfeiture or compensation, or, to speak more explicitly, whether a person claiming against a will is bound to relinquish the benefit thereby given to him *in toto*, or only to the extent of indemnifying the persons disappointed by his election, and it now seems to be settled that the principle in England is compensation and not forfeiture.[11] Thus, where a per-

[1] *Per* JAMES, L. J., *Cooper* v. *Cooper*, L. R., 6 Ch., 19.

[2] See Indian Succession Act, s. 169, illustrations (*b*) and (*c*).

[3] *Per* LORD LOUGHBOROUGH, *Wilson* v. *Townshend*, 2 Ves., 693; see also *Webb* v. *E. of Shaftesbury*, 7 Ves., 480.

[4] *Wollaston* v. *King*, L. R., 8 Eq., 165.

[5] *Andrew* v. *Trinity Hall*, 9 Ves., 525, 533; *Warren* v. *Rudall*, 1 J. and H., 1.

[6] *Talbot* v. *Earl of Radnor*, 3 M. and K., 254.

[7] L. R., 6 Ch., 15; L. R., 7 H. L., 53.

[8] Intestate and Testamentary Succession in India, p. 197.

[9] *Per* LORD CAIRNS in *Cooper* v. *Cooper*, L. R., 7 H. L., 68, on appeal.

[10] Indian Succession Act, s. 169, which applies to Hindus etc., *Whistler* v. *Webster*, 2 Ves. 371; *Welby* v. *Welby*, 2 V. and B., 199. Intestate and Testamentary Succession in India, p. 197.

[11] See 1 Jarm., 445, 446, and the cases there cited; see also *Rogers* v. *Jones*, L. R., 3 Ch. D., 688; *Pickersgill* v. *Rodger*, L. R., 5 Ch. D., 163.

son purports under a power of appointment to give property, the subject of the power, to persons who are not the objects of the power, and if to the person, who would be defeated by that gift, free disposable property belonging to the testator is given by the same instrument, a case of election is raised.[1] Under the Indian Succession Act, however, the legatee, who is put to his election and elects against the will, forfeits all benefit under the will.

The intention of the testator to dispose of the property which is not his own should be clear: it must appear by demonstration plain by necessary implication,[2] and must in all cases appear by the will itself,[3] parol evidence being inadmissible for the purpose of showing it.[4]

A release of a debt due from a third person to a legatee will put the latter to his election if a debt of his be released by the testator.[5] A devise or bequest, however, upon condition that the devisee or legatee parts with his own property, does not put the legatee to election.[6] No case for election arises where the property in question is not acquired until after the death of the testator;[7] nor is there any election between what a man takes under a will and what he takes under a derivative title.[8]

Parol evidence, as I have just said, is not admissible for the purpose of raising a case of election. Thus, parol evidence will not be received to show that the testator had supposed himself the absolute owner of, and intended to include in the residuary bequest, certain property in which he had only a life-interest, for the purpose of raising a case of election against a legatee under the will, who also took an interest in such property under settlement.[9]

To raise an inference of election, it is not sufficient that the person knew of the instrument giving it. He must know also of his right to elect.[10] Moreover, a person is never bound to elect until the circumstances and value of the the properties between which he has to elect are known to him.[11] An election under a misconception of the extent of claims on the fund elected is not conclusive.[12]

[1] *Whistler* v. *Webster*, 2 Ves., 367; see *In re Brooksbank*, L. R., 34 Ch. D., 160.

[2] *Rancliffe* v. *Parkyns*, 6 Dow., 149, *per* LORD ELDON; Williams on Executors, 1447-8; 1 Jarm., 452-3.

[3] *Per* LORD LANGDALE, M. R., in *Clementson* v. *Gandy*, 1 Keen, 309.

[4] *Stratton* v. *Bert*, 1 Ves., 285.

[5] *Synge* v. *Synge*, L. R., 15 Eq., 389, on appeal L. R., 9 Chan., 128.

[6] *Middleton* v. *Windross*, L. R., 16 Eq., 212.

[7] *Grissel* v. *Swinhoe*, L. R., 7 Eq., 291; *Howells* v. *Jenkins*, 2 J. and H., 705.

[8] *Cavan (Lady)* v. *Pulteney*, 2 Ves., 544; 3 Ves., 334.

[9] *Clementson* v. *Gandy*, 1 Keen, 309; see 1 Jarm., 452, and *Stratton* v. *Bert*, 1 Ves., 285.

[10] *Morgan* v. *Edwards*, 1 Bli., N. S., 401.

[11] *Dillon* v. *Parker*, 1 Sw. 382 (*n*); *Newman* v. *Newman*, 1 Bro. C. C., 186; *Wake* v. *Wake*, 1 Ves., 335; *Whistler* v. *Webster*, 2 Ves., 371; *Hender* v. *Rose*, 3 P. W., 123 (*n*).

[12] *Kidney* v. *Coussmaker*, 12 Ves., 136.

In order to ascertain the value of the funds, a legatee is entitled to have all necessary accounts taken.[1] In England, where there is full knowledge on the part of the legatee, election will be presumed from acquiescence.[2] The Indian Succession Act expressly declares that acceptance of a benefit given by the will constitutes an election by the legatee to take under the will, if he has knowledge of his right to elect, and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances;[3] and that such knowledge or waiver of inquiry shall, in the absence of evidence to the contrary, be presumed if the legatee has enjoyed for two years the benefits provided for him by the will without doing any act to express dissent.[4] The presumption may of course be rebutted. When it arises, it would seem to be binding upon those claiming under the person electing.[5] It is to be observed that the period of two years limited by the Indian Succession Act, is a period of *actual* enjoyment of the benefits provided by the will. In England, in the case of *Sopwith* v. *Maughan*,[6] where the legatee had been in receipt of a provision under the will for sixteen years, being ignorant of his right to elect, it was held, that he was not estopped. Unless "the circumstances which would influence the judgment of a reasonable man in making an election" are known to the person making the election, it will not be binding. But if the legatee does any act which renders it impossible to replace the persons interested in the subject matter of a bequest in the same condition, as if the act had not been done, knowledge of the right to elect and of the circumstances or waiver of inquiry into the circumstances will be inferred.[7] Thus, if A bequeaths to B an estate to which C is entitled, and to C a coal-mine which C takes possession of and exhausts, C will be taken to have confirmed the bequest to B. Accordingly, in considering whether there has been an election, the questions are, whether the parties acting or acquiescing, were aware of their rights; whether they intended election and whether the individual affected by the claim can be restored to the same situation as if the acts had not been done.[8]

[1] *Buttricke* v. *Broadhurst*, 3 Bro. C. C., 88; 1 Ves., 171; *Pusey* v. *Desbouverie*, 3 P. Wms., 315. See note to *Dillon* v. *Parker*, 1 Swan., 318. Williams on Executors, 1455. Intestate and Testamentary Succession in India, p 198.

[2] *Worthington* v. *Wiginton*, 20 Beav., 67; see *Aidesoife* v. *Bennet*, 2 Dick., 463; *Dewar* v. *Maitland*, L. R., 2 Eq, 834.

[3] Indian Succession Act, s. 173, which applies to Hindus etc.

[4] *Ibid*, s. 174, which also applies to Hindus etc.

[5] *Dewar* v. *Maitland*, L. R., 2 Eq., 834; *Pramada Dasi* v. *Lukhi Narain Mitter*, I. L. R., 12 Cal., 60.

[6] 30 Beav., 235.

[7] Indian Succession Act, s. 175, which applies to Hindus etc.

[8] Williams on Executors, p. 1455.

Election is a question of intention and may be implied from circumstances.[1] Where the person who has to elect between two estates is in possession of both, no presumption of election can be drawn from the fact that he continues in possession.[2] In cases where the person bound to elect has died soon after the death of the testator, the Court, in the absence of evidence, in deciding whether there has or has not been an election, will be influenced by the consideration whether it was for the benefit of the person entitled to elect or disclaim.[3] If there are several next-of-kin, each of them may have a separate right of election; but neither the election of the majority, nor that of the administrator, will bind the others.[4] Where, however the presumption of election is raised, it is binding upon those who claim under the person electing.[5]

The doctrine of election is not applicable when the bequest is invalid on account of incapacity to bequeath by reason of infancy or coverture.[6] Thus, if a person of the age of 18 years domiciled in British India (and therefore competent to make a will,) but owning real property in England, to which A is his heir at law, bequeaths a legacy to A and subject thereto devises and bequeaths to B "all his property whatsoever and wheresoever" and dies under 21, the real property in England, which is governed by the *lex rei sitae*, by which the testator was an infant, will not pass by the will, but will pass to A, as heir at law, and he may claim the legacy without giving up the real property in England.[7]

It has been observed that the rule as to election is applicable whether the testator did, or did not, believe the property which he professes to dispose of by his will to be his own. The only question is, whether the testator meant the property to go in the manner indicated by him.[8] "The Court will not speculate on what he would have done, if he had known one thing or another.[9]

A bequest for a man's benefit, as for the payment of his debts, is, for the purpose of election, the same thing as a bequest made to himself,[10] but a person

[1] *Edwards* v. *Morgan*, 1 Bli. N. S., 401; *Spread* v. *Morgan*, 11 H. of L., 588. As to what acts of acceptance or acquiescence constitute an implied election, see *Rumbold* v. *Rumbold*, 3 Ves., 65; *Simpson* v. *Vickers*, 14 Ves., 341.

[2] *Padbury* v. *Clark*, 2 Mac. and G., 298; *Spread* v. *Morgan*, 11 H. L. C., 588.

[3] See *Harris* v. *Watkins*, 2 K. and J., 473.

[4] *Fytche* v. *Fytche*, L. R., 7 Eq., 494. Intestate and Testementary Succession in India, p. 199.

[5] *Dewar* v. *Maitland*, L. R., 2 Eq., 834; *Pramada Sasi* v. *Lukhi Narain Mitter*, I. L. R. 12 Cal., 60.

[6] *Hearle* v. *Greenbank*, 3 Atk., 695. See *Blaiklock* v. *Grindle*, L. R., 7 Eq., 215; Williams on Executors, 1449. See *Cooper* v. *Cooper*, L. R., 7 H. L., 53, *per* LORD CAIRNS.

[7] Indian Succession Act, s. 169, illustration (*d*).

[8] *Thellusson* v. *Woodford*, 13 Ves., 221.

[9] *Whistler* v. *Webster*, 2 Ves., 370, *per* LORD ALVANLEY; *In re Brooksbank*, L. R., 34 Ch. D., 160.

[10] Indian Succession Act, s. 170, which applies to Hindus etc.

taking no benefit directly under the will, but deriving a benefit indirectly, is not put to his election.[1] In *Grissel* v. *Swinhoe*,[2] the testator, who was entitled, under a settlement, subject to a life-interest, to a moiety of a fund, by will, after reciting (erroneously) that he was under the settlement, "subject to the trusts therein contained," entitled to the whole, purported to bequeath the whole, and gave one moiety to the husband of the lady who was really entitled under the settlement to a moiety of the fund,—it was held that the husband, who had become his wife's administrator, was not bound to elect between the legacy and his wife's moiety.[3]

The doctrine of election does not preclude a party claiming by the will from enjoying a derivative interest to which he is entitled at law under a legal estate taken in opposition to the will. Thus, in England, a man may be tenant by courtesy of an estate-tail held by his wife in opposition to a will under which he accepts a legacy.[4]

A person who in his individual capacity takes a benefit under the will, may in another character elect to take in opposition to the will.[5] The following illustration will explain this proposition:—The estate of Sultanpur is settled upon A for life, and after his death upon B. A leaves the estate of Sultanpur to D, and 2,000 rupees to B and 1,000 rupees to C, who is B's only child. B dies intestate, shortly after the testator, without having made an election. C takes out administration to B, and as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of 2,000 rupees. C may do this, and yet claim his legacy of 1,000 rupees under the will.[6]

Where a particular gift is expressed in the will to be in lieu of something belonging to the legatee, which is also in terms disposed of by the will, if the legatee claims that thing, he must relinquish the particular gift, but he is not bound to relinquish any other benefit given to him by the will.[7] Thus, if A, under whose marriage-settlement his wife is entitled, if she survives him, to the enjoyment of the estate of Sultanpur during her life, by his will bequeaths to his wife an annuity of 200*l.* during her life, in lieu of her interests in the estate of Sultanpur, which estate he bequeaths to his son, and he also gives his wife a legacy of 1,000*l.*, and the widow elects to take what she is entitled to under the settlement, she is bound to relinquish the annuity, but not the legacy of 1,000*l.*

[1] *Ibid.*, s. 171, which applies to Hindus etc.

[2] L. R., 7 Eq., 291.

[3] See *Cooper* v. *Cooper*, L. R., 6 Ch. D., 21; L. R., 7 H. L., 53.

[4] Williams on Executors, 1448-9.

[5] Indian Succession Act, s. 172, which also applies to Hindus etc.

[6] *Ibid.*

[7] *Ibid.*, 172, Exception.

If the legatee does not, within one year after the death of the testator, signify to the testator's representatives his intention to confirm or to dissent from the will, the representatives may, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it, he will be deemed to have elected to confirm the will.[1] In case of disability, however, the election will be postponed until the disability ceases, or until the election can be made by some competent authority.[2]

In England, the usual practice, in case of infants who are incapable of electing, is to direct an enquiry whether it is to the advantage of the infant to elect or disclaim,[3] and section 177 of the Indian Succession Act seems to contemplate a like course being followed in India.

Before leaving the subject of bequests and their incidents, I must refer shortly to gifts made in contemplation of death, or, to adopt the term used in the Civil law, *donationes mortis causâ*, as such gifts are, in some respects, analogous to legacies.

A gift is said to be made in contemplation of death where a person who is ill and expects to die shortly of his illness delivers to another the possession of any moveable property to keep as a gift, in case he (the donor) should die of that illness.[4]

Like legacies, gifts in contemplation of death are dependent upon the death of the donor and subject to his debts.[5] On the one hand, gifts may be resumed, and on the other, legacies may be revoked in the lifetime of the testator. A gift in contemplation of death, however, cannot be made in respect of immoveable property, but it may be made in respect of any moveable property which may be disposed of by will.[6] Being dependent upon death of the donor, it will not take effect if the donor recovers from the illness during which it was made, or if the donor survives the donee.

The provisions of the Indian Succession Act as to *donationes mortis causâ* follow the decided cases in England. They have not been made applicable to Hindus by the Hindu Wills Act.

Bonds, bills, policies of assurance,[7] and cheques,[8] have all been held to be

[1] Indian Succession Act, s. 176, which applies to Hindus etc.

[2] *Ibid.*, s. 177, which also applies to Hindus etc.

[3] See *Brown* v. *Brown*, L. R., 2 Eq., 481-486.

[4] Indian Succession Act, s. 178. This section does not apply to Hindus.

[5] *Tate* v. *Leithead*, Kay, 658.

[6] See illustrations to s. 178 of the Indian Succession Act.

[7] *Shanley* v. *Harvey*, 2 Ed., 126; *Duffield* v. *Elwes*, 1 Bli., N. S., 497; *Veal* v. *Veal*, 27 Beav., 303; *Witt* v. *Amiss*, 1 B. and S., 109; *Thomson* v. *Hefferman*, 4 Dr. and W., 285.

[8] *Hewett* v. *Kaye*, L. R., 6 Eq., 198; see *Beak* v. *Beak*, L. R., 13 Eq., 489.

subjects of valid gifts in contemplation of death. A cheque, however, drawn by the donor himself must be paid before the donor's death.[1] Stock, which does not pass by delivery, cannot, in England, be subject of a *donatio mortis causâ.* Although under s. 178 of the Indian Succession Act any moveable property which may be disposed of by will may be disposed of by a gift in contemplation of death, it seems from illustration (*c*) that under that Act delivery is necessary to complete the donee's title.[2] Constructive delivery both in England[3] and under the Indian Succession Act,[4] will be sufficient, but it must be absolute.[5]

The burden of proof is on the donee to show that a gift was made in contemplation of death.[6]

A gift in contemplation of death cannot be revoked by will,[7] though it may be satisfied by a legacy.[8] A *donatio mortis causâ* does not require probate nor does it require the assent of the executor of the deceased.[9]

[1] *Hewett* v. *Kaye*, L. R., 6 Eq., 198.
[2] See *Ward* v. *Turner*, 2 Ves. Sen., 431.
[3] *Farquharson* v. *Cave*, 2 Coll., 356.
[4] Section 178, illustration (*b*).
[5] *Reddel* v. *Dobree*, 10 Sim., 244.
[6] *Cosnahan* v. *Grice*, 15 Moo. P. C., 215.
[7] *Jones* v. *Selby*, Pr. Ch., 300.
[8] *Ibid.*
[9] Williams on Executors, p. 787.

LECTURE X.

OF THE GRANT AND REVOCATION OF PROBATE AND THE PRACTICE RELATING THERETO.

Course of Legislation in India in regard to Probate—Character and property of Executors—Probate in case of wills under Hindu Law—Probate, Definition of—Appointment of Executors either express or implied—Who may be executors—Administration for use and benefit of lunatic executor—Grant of probate to several executors—Administration with copy annexed of authenticated copy of will proved abroad—Probate of codicil discovered after probate of will—Accrual of representation to surviving executor—Right of executor how established—Effect of Probate—Title of executor of will under Hindu Law—Extent and application of Probate and Administration Act—Grant of Administration, where executor has not renounced—Procedure where executor renounces or fails to accept—Grant of administration to Universal or Residuary legatee—Limited grant of Probate—Grants limited in duration—Probate of lost wills—Probate where will is outside jurisdiction—Grants for use and benefit of others having right—Administration *pendente lite*—Grants for special purposes—Grants with exception—Grants of the Rest—Grants of effects *not* administered—Alteration in grants—Revocation of grants for just cause—Who may apply for revocation of Probate—Practice in granting and revoking Probate—Jurisdiction in matters of Probate—Petition for Probate—Conclusiveness of Probate—Publication of citations—Who may oppose probate—Administration Bonds--Procedure in contentious cases—Costs.

In dealing with grants of probate and letters of administration and with the powers, duties and liabilities of executors and administrators in India, it is necessary to bear in mind the course of legislation upon these subjects. The Indian Succession Act originally did not apply to Hindus, Mahomedans or Buddhists, nor to persons exempted under s. 332 of the Act. The Hindu Wills Act, 1870, which was limited to the Presidency towns and Lower Bengal, made the provisions of the Indian Succession Act, as to grants of probate and letters of administration (except s. 190),[1] and the practice relating thereto, and as to the powers, duties and liabilities of executors and administrators, applicable, so far as relates to grants of probate and letters of administration with the will annexed, and to executors and administators with the will annexed, to the wills of Hindus, Jainas, Sikhs and Buddhists, made on, or after, the 1st September, 1870. By the Probate and Administration Act, 1881, which subject to the provisio in section 2, applies to the whole of British India, the provisions of the Indian Succession Act, to which I have just referred as having been made applicable

[1] That section enacted that "no right to any part of the property to a person who has died intestate can be established in a Court of Justice, unless letters of administration have first been granted by a Court of Competent Jurisdiction." See Act VII of 1889, ss. 1, 21.

under the Hindu Wills Act, were, with the exception of s. 187,[1] repealed and re-enacted (forming chapters II to XIII, inclusive, of the Probate and Administration Act) with a somewhat wider application. They were made to apply to the case of every Hindu, Muhammadan, Buddhist and person exempted under s. 332 of the Indian Succession Act dying before, on, or after, the 1st of April, 1881, with the proviso, that, except in cases to which the Hindu Wills Act applies, no Court in any local area beyond the limits of the towns of Calcutta, Madras, and Bombay and the territories for the time being administered by the Chief Commissioner of Lower[2] Burmah, and no High Court in exercise of the concurrent jurisdiction over such local area conferred by that Act (the Probate and Administration Act) should receive applications for probate or letters of administration, until the Local Government had, with the previous sanction of the Governor-General in Council, by a notification in the official Gazette, authorized it to do so. The only section of the Indian Succession Act dealing with probate and administration which is now embodied in the Hindu Wills Act, is s. 187. It is not incorporated in the Probate and Administration Act.[3]

A number of modifications in the sections of the Indian Succession Act and in the Probate and Administration Act have been made by Act VI of 1889. These will be noticed as the sections are referred to hereafter.

In the case of *In the goods of Bebee Muttra*,[4] it was established that the late Supreme Court had general ecclesiastical jurisdiction within the limits of Calcutta and by virtue of such jurisdiction could grant probate of the wills of Hindus, who died leaving property in Calcutta. It had long been the practice of the Mayor's Court and of the Supreme Court to grant probate and administration in the goods of Hindus and Mahomedans, but when 21 Geo. III, c. 70 arrived in India, some time about July, 1782, the Supreme Court was of opinion that that Statute had altered the jurisdiction of the Court and it resolved not to grant probate or administration in case of either Hindus or Mahomedans,[5] and, until 1816, none were granted. From the report in the case of *Bebee Muttra*, it appears that the Court, before deciding, caused the records to be searched in order to ascertain what had been the practice in Calcutta. From the returns

[1] S. 187 provides that "no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under the s. 180 of the Act." Section 180 is no longer incorporated in the Hindu Wills Act, but it now forms s. 5 of the Probate and Administration Act.

[2] See Act XX of 1866, ss. 2, 4.

[3] See *Shaikh Moosa* v. *Shaikh Essa*, I. L. R., 8 Bom., 241; see *Krishna Kinkur Roy* v. *Rai Mohun Roy*, I. L. R., 14 Cal., 37.

[4] Morton's Reports by Montriou, p. 191, decided 1832.

[5] See *In the goods of Hadjee Mustapha*, (decided 1791), Morton's Reports by Montriou, 180.

made from the office of the Registrar, it was found that from January, 1775, (when the Supreme Court, though established in 1874, first sat for the purpose of transacting business) to July, 1782 (the latter month not being included) upwards of 200 probates and administrations of the will and effects of Hindus and Mahomedans were granted. Then, as to the effects of Mahomedans, there was an entire cessation until 1804, while, as to the effects of Hindus, there was an entire cessation until 1816. Between 1804 and 1814 six probates or administrations of the wills and effects of Mahomedans was granted, but from 1814 to 1816 there were none. Between 1816 and the year 1832 the number of probates and administrations granted to Hindus and Mahomedans amounted to 230. It was also found on inquiry that in Madras, while it had always been considered doubtful whether the Charter of that Presidency intended that probates and letters of administration should be granted to natives, the Court had been in the habit of granting them, but that the practice ceased on the establishment of the Madras Supreme Court in 1801, and was not revived till 1812.[1]

In England, before 20 and 21 Vict., c. 77, s. 3, the power of granting administration to the personal estate of a deceased person was, by the Ecclesiastical Courts, vested in the Ordinary, the Judge of the Ecclesiastical Court, to whose jurisdiction the administration upon intestacy and the probate of wills belonged.[2] And, it seems that letters of administration granted by the late Supreme Court in Hindus conveyed no more estate than what by the Ecclesiastical law of England vested in the Ordinary or the administrator,—that is to say, personal estate only.[3]

Under s. 179 of the Indian Succession Act, which, as I have said, was embodied in the Wills Act in its original form, the executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes and all the property of the deceased person vests in him as such.[4] That section is no longer embodied in the Wills Act, but it now forms s. 4 of the Probate and Administration Act, a proviso being, however, added, that nothing in that Act shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person.[5] This proviso saves the rights of the members of a joint Hindu family, for in such a family there is no such thing as succession properly so called. The whole body of such a family, consisting of males and females, constitutes a sort

[1] See *Chellummal* v. *Garrow*, 2 Strange's Notes of Cases, 1; *In the matter of the will of Taral*, *Ibid*, 156.

[2] 31 Ed. III, c. 11; see 2 Stephen's Black. Com., 12, 8th Edn. By 20 and 21 Vict., c. 77 the jurisdiction of the Ordinary was transferred to the Probate Court.

[3] See *Kadumbinee Dossee* v. *Koylash Kaminee Dossee*, I. L. R., 2 Cal., 431, p. 443.

[4] Indian Succession Act, s. 179; Act V of 1881, s. 4.

[5] Act V of 1831, s. 4.

of corporation, some of the members of which are coparceners, that is, persons who, on partition, would be entitled to demand a share, while others are only entitled to maintenance. . . . . Until they elect to claim a partition, the property continues to devolve upon the members of the family for the time being by survivorship, and not by succession.[1]

Prior to the Probate and Administration Act, in cases to which the Hindu Wills Act and the Indian Succession Act did not apply, probate could only be granted under the Supreme Court and High Court Charters;[2] but the representative status conferred by such grant fell far short of that conferred by similar grants in the case of deceased European British subjects. In the case of wills of Hindus, probate conferred no right of property analogous to the estate or interest conferred upon an English executor. In the case of *Jaykali* v. *Sibnath*,[3] PHEAR, J., in 1866, before the Hindu Wills Act, thus expressed himself: "I suppose it is now clear that probate does not confer upon the executor of a Hindu will any personal rights of property analogous in any way to an English estate or interest. The will gives him just such powers of dealing with the property comprehended in it as its words express and no more. Beyond the scope of the will, and so far as he is not constructively restricted by its directions, it may be that he has the powers which are implied in the bare authority of a manager during minority; but these are all he can claim. At any rate, this doctrine seems to have been laid down with regard to immoveable property in the case of *Sreemutty Dossee* v. *Taracharn Coondoo*,[4] by which I readily admit myself bound to be guided." So, in the case of *Kherodemoney Dassee* v. *Doorgamoney Dassee*,[5] MARKBY, J., said, "There is no doubt that the word 'vest' is not an appropriate one to describe the position of a Hindu executor in a will made prior to the Hindu Wills Act. It has been frequently held, that the mere appointment of a person as executor to a Hindu does not cause any property to vest in him at all, and that, if as executor he is entitled to hold the property, he holds only as manager."[6]

An executor is the person to whom the execution of the last will of a deceased person is by the testator's appointment confided and an administrator

[1] Mayne's Hindu Law, § 246, and see § 432.

[2] See *In the goods of Bebee Muttra*, Morton's Report by Montriou, p. 199.

[3] 2 B. L. R., (O. C.), 1.

[4] Bourke, Pt. VII, p. 48.

[5] I. L. R., 4 Calc., 455, (S. C.), 3 C. L. R., 315.

[6] *Sreemutty Dossee* v. *Taracharn Coondoo Chowdhry*, Bourke, Pt. VII, 48; *Kherodemoney Dossee* v. *Durgamoney Dossee*, I. L. R., 4 Calc., 455, (S. C.), 3 C. L. R., 315; *Maniklal Atmaram* v. *Manchershi Dinsha*, I. L. R., 1 Bom., 269; and *Lallubhai Bapubhai* v. *Manukverbai*, 2 Bom., 388. As to the representation of beneficiaries in suits concerning property vested in executors or administrators, see s. 437 of the Code of Civil Procedure, Act XIV of 1882.

is the person appointed by competent authority to administer the estate of a deceased person where there is no executor.[1] After his appointment the office and powers of an administrator are for the most part the same as those of an executor.[2]

In India, under the Indian Succession Act, it has been held that the executor of an executor is not derivative executor of the original testator, even though such testator died before 1866,—that is, that property vested in a testator as executor of another does not vest in his executor.[3] It is only the actual property of the deceased that vests in an executor or administrator.[4] In England, on the other hand, the executor of an executor, who has proved the will, represents the first testator, and cannot prove his own testator's will and refuse to administer the estate of the first testator;[5] but the executor of an executor does not represent the original testator, unless the first executor has proved the will.[6] The administrator of an executor does not represent the testator, so that if an executor dies intestate without having administered the estate of his testator, an administrator *de bonis non* of the testator must be appointed.[7]

Probate, *i. e.*, a copy of a will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator[8] can only be granted to an executor appointed by the will,[9] but the appointment of the executor may be either express or by necessary implication.[10] As a general rule any person may be appointed executor. An infant, however young, may be appointed, but probate will not be granted to him during his minority.[11] If he is sole executor or sole residuary legatee, letters of administration with the will annexed may be granted to his legal guardian, or any other person whom the Court may think fit, until he shall have completed the age of 18 years.[12]

[1] Indian Succession Act, s. 3.

[2] Touch., p. 471; *Blackborough* v. *Davis*, 1 P. Wms., 43.

[3] *DeSouza* v. *Secretary of State*, 12 B. L. R., 423.

[4] *Ibid.* See *Behary Lall Sandyal* v. *Juggomohun Gossain*, I L. R., 4 Calc., 5; (S. C.), 2 C. L. R., 422.

[5] *Brooke* v. *Haymes*, L. R., 6 Eq., 25; see *Barr* v. *Carter*, 2 Cox, 429, *Twyford* v. *Trail*, 7 Sim., 92.

[6] *Wankford* v. *Wankford*, 1 Salk., 299.

[7] Williams on Executors, 258; see *Savage* v. *Blythe*, 2 Hagg. App., 150. See Intestate and Testamentary Succession in India, p. 207.

[8] Indian Succession Act, s. 3; Act V of 1881, s. 3; see *Mun Mohun Ghossal* v. *Pareshnath Roy*, 22 W. R., 174.

[9] Indian Succession Act, s. 181; Act V of 1881, s. 6.

[10] *Ibid*, s. 182; Act V of 1881, s. 7; *Mun Mohan Ghossal* v. *Pareshnath Roy*, 22 W. R., 175, *per* PONTIFEX, J.

[11] Indian Succession Act, s. 183, 215; Act V of 1881, s. 8, 31.

[12] Indian Succession Act, s. 215; Act V of 1881, s. 31.

In England, where an infant is appointed sole executor, administration is granted under 38 Geo. III, c. 87, s. 6, to his guardian or to such person as the Probate Court may think proper, such administrator being called administrator *durante minore aetate.*[1]

A married woman may also be appointed executrix, but in cases to which the Indian Succession Act applies, she must have the previous consent of her husband.[2] In cases to which the Probate and Administration Act applies, no such restriction is placed upon married women,[3] because, as the Select Committee, to whom the original bill was referred, say in their report, the imposition of such a condition would be inconsistent with the proprietary status accorded to married women among a large proportion of the persons for whom the Act is intended, and would confer a power on the husband which would, in many cases, be likely to be abused. In England, also, the consent of the husband was necessary to the acceptance of a grant of probate by a married woman.[4]

If there are several executors, one of whom is of full age, no administration during minority should be granted, as the executor, who is of full age may execute the will.[5] But if there are two or more minors appointed executors, and there is no executor who has attained majority, in that case the Court will grant administration limited, until one of them has attained the age of majority.[6]

In England, a corporation also may be appointed executor.[7] But where a corporation aggregate has been appointed executor of a will, the Court in England will grant letters of administration, with the will annexed, to a syndic duly appointed by the corporation to take the grant; but no grant will be made before the syndic is before the Court.[8] Where a testator in India nominated his brother and "Messrs. Cockerell & Co., East India Agents, London," and one A. B. to be his executors, and before his death, the firm of Cockerell & Co., which consisted of four members, had been dissolved,—SIR JENNER FUST held, that the appointment was not of the firm collectively, but of the persons composing it individually, and that each of the late members was entitled to be joined with the other executors.[9]

Aliens may be executors.[10] A bankrupt also may be executor; but the

[1] Williams' Personal Property, 342.

[2] Indian Succession Act, s. 183.

[3] Act V of 1881, s. 8.

[4] *Thrustout* v. *Coppin*, 2 W. B, 801.

[5] Williams on Executors, 486.

[6] Indian Succession Act, s. 216; Act V of 1851, s. 32.

[7] See *In the goods of William Haynes*, 3 Curt., 75., Williams on Executors, 233.

[8] *In the goods of Darke*, 1 Sw. and Tr., 516.

[9] Williams on Executors, 233, citing *In the goods of Fernie*, 6 Notes of Cases, 657.

[10] *Ibid*

Court will in some cases appoint a receiver,[1] unless the person appointed have been known by the testator to have been a bankrupt.[2] Previous to the Indian Succession Act, bankruptcy seems to have been considered by the Supreme Court a disqualification.[3]

In India[4] as in England, lunatics, idiots and persons of unsound mind are of course, incapable of acting as executors or administrators, and probate cannot be granted to such persons, and if a person appointed executor or administrator becomes *non compos*, the Court may commit administration to another.[5] In England, in the case of a sole executor becoming a lunatic, the Court will generally make a limited grant to his committee for his use and benefit during his lunacy,[6] or administration with the will annexed may, with the consent of his committee, be granted to the residuary legatee during the lunacy.[7] So, under s. 217 of the Indian Succession Act, if a sole executor or a sole universal or residuary legatee is a lunatic, letters of administration with the will annexed may be granted to the person to whom his estate has been committed by competent authority; or, if there be no such person, to such person as the Court may think fit to appoint, for the use and benefit of the lunatic, until he shall become of sound mind. Section 33 of the Probate and Administration Act is the same in terms, except that it includes the case of minority as well as lunacy.

In the case of a British-born subject, who died leaving assets in Moulmein, but no assets in Calcutta, and a will dated 5th August, 1865, before the Succession Act came into force, the High Court in Bengal refused to grant probate, or letters of administration with the will annexed, to his executrix.[8]

In England, where a testator, by his will, directed the legatees to appoint two persons to execute his testamentary bequests, the Court granted probate to the nominees of the legatees.[9] So also, where a testator authorized a person to nominate some one to see her will executed, and that person nominated himself, the Court granted him probate.[10] Whether probate would be granted under the Indian Acts to an executor appointed in that manner has not yet

[1] *Langley* v. *Hawk*, 5 Madd., 46.

[2] *Gladdon* v. *Stoneman*, 1 Madd., 143 (note).

[3] *In the goods of Jackson*, Morton's Rep., 28.

[4] Indian Succession Act, s. 183; Act V of 1881, s. 8.

[5] *Evans* v. *Taylor*, 2 Roberts, 128; *Mills* v. *Wills*, 1 Salk., 36. Williams on Executors, 282; Indian Succession Act, s. 217; Probate and Administration Act, s. 33.

[6] *In the goods of Phillip*, 2 Ad., 336 note (*b*).

[7] *In the goods of Milnes*, 3 Ad., 55.

[8] *Saunders* v. *Nga Shoay Geen*, 8 W. R., 3. See Act XXV of 1838.

[9] *In the goods of Cringan*, 1 Hagg., 548.

[10] *In the goods of Ryder*, 2 Sw. and Tr., 128.

been decided. In the case of *Jackson* v. *Paulet*,[1] it was objected, even in England, that probate could be decreed only to a person who was appointed nominee by the will; but the Court said the case was not like one where a testator in his will reserved to himself a power to deal hereafter with his will by writings not duly executed.[2]

It has been already observed that the appointment of an executor need not be express, but may arise by necessary implication. Thus, if the testator directs that B should be his executor, if A will not act, B will be executor by implication.[3] So, if A gives a legacy to B and several legacies to other persons, among the rest to his daughter-in-law, C, and adds, "but should the within named C be not living, I do constitute and appoint B my whole and sole executrix," C will be executrix by implication. Again, where A appoints several persons executors of his will and codicils, and his nephew residuary legatee, and in another codicil are these words:—"I appoint my nephew my residuary legatee to discharge all lawful demands against my will and codicils, signed of different dates," the nephew is appointed an executor by implication.[4] 'Necessary implication,' it was said, means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed.[5]

An executor by implication is usually called executor *according to the tenor.*

In *In the goods of Baylis*,[6] where a testator by the first clause of his will directed his debts and testamentary expenses to be paid, and then gave all his personal estate to certain persons in trust to convert into money and receive it in such a manner as they should deem expedient, and to divide the proceeds amongst his children, with the exception of some furniture, which he gave to one of his daughters, it was held, that the trustees were executors according to to the tenor. That case was followed by JACKSON and TOTTENHAM, JJ., in the case of *Monohur Mookerjee*,[7] where the son of the testator, though not expressly appointed an executor, was directed to receive and pay the testator's debts and get in and distribute his personal estate. To constitute an executor according to the tenor, it seems there must be words importing a general power to receive and pay what is due to the estate. A power merely to pay what is vested in a trustee as trustee to the particular person, for whose use he held it, is not

[1] 2 Rob., 344. Intestate and Testamentary Succession in India, p. 209.

[2] See Williams on Executors, 251 (*n*).

[3] Indian Succession Act, s. 182, Act V of 1881, s. 7, illustration (*a*); Godolph, Pt. II, c. 5, s. 3; cited in Williams on Executors, p. 246.

[4] *Ibid.*, illustrations (*b*) and (*c*); *Grant* v. *Leslie*, 3 Phillim, 116.

[5] *Wilkinson* v. *Adam*, 1 Ves. and B., 465, *per* LORD ELDON.

[6] L. R., 1 P. and D., 21.

[7] I. L. R., 5 Calc., 756; (S. C.) 6 C. L. R., 228.

sufficient.[1] Thus, where the whole personal property was left to a trustee in trust for a specific purpose, and no executor was named in the will, it was held that the trustee was not entitled to probate as executor according to the tenor.[2] So, in the case of *In the goods of Toomy*,[3] a direction to a person to pay debts and funeral expenses, not out of the general estate, but out of a particular fund, was held not to constitute him executor according to the tenor.[4] In short, the general rule is that, unless the Court be able to gather from the words of the will that a person named trustee therein is required to pay the debts of the deceased and generally to administer his estate, it will not grant probate to him as executor according to the tenor.[5] Under words pointing at the office of an executor, or at the rights of exeecutors, persons may be held to be executors by implication, as where the testator says, "I commit all my goods to the administration of A. B."[6] or to the disposition of A B.[7] In *In the goods of Bradley*,[8] the testator by his will said "I appoint R. H. P. and T. E. W.," but did not state in what capacity he appointed them and he also bequeathed legacies to "each of my executors" and gave to his "said executors" the residue of his property with certain directions as to it, and the Court held that, by the words of the will, R. H. P. and T. E. W., were by implication appointed executors.

Where a testator by his will appointed his wife, H, guardian of his infant children "in order that of all his property she should carry on the management (until the youngest son should attain the age of 22 years), and in the testator's name the management of his firm,"—H was held to be executrix by implication and entitled to probate.[9] In *In the goods of Radhika Mohan Sett*,[10] probate of the will of a Hindu was granted to his widow and heiress, who was also universal legatee under the will, as executor by necessary implication, there being no executor mentioned in the will.[11] So in the case of *Mun Mohun Ghossal* v. *Pareshnath Roy*,[12] a sole residuary devisee was held to be entitled to probate as executor by implication.

[1] *In the Goods of Jones*, 2 Sw. and Tr., 155, *per* SIR C. CRESSWELL.

[2] *Ibid.*

[3] 3 Sw. and Tr., 562.

[4] *In the Goods of Davis*, 3 Curt., 748.

[5] *In the Goods of Punchard*, L. R., 2 P. and D., 269. See *In the Goods of Lowry*, L. R., 3 P. and D., 157.

[6] Godolph., Pt. II, c. 5, s. 3.

[7] *Pemberton* v. *Cony*, Cro. Eliz., 164; Williams on Executors, 243.

[8] L. R., 1 P. D., 215.

[9] *Hamabai* v. *Bamanji Nasarvanji*, 7 Bom. H. C. R., A. C. J., 64.

[10] 7 B. L R., 563.

[11] Intestate and Testamentary Succession in India, p. 211.

[12] 22 W. R., 175.

So also, if the testator by his will declare that A B shall have his goods after his death, "to pay his debts, and otherwise to dispose at his pleasure," A B is his executor;[1] or if the testator direct certain persons to pay debts, funeral charges, and the expenses of proving the will, these persons are executors according to the tenor;[2] or if the testator, supposing his child, his brother, or his kinsman to be dead, say in his will—"Forasmuch as my child, my brother &c., is dead, I make A B executor; in this case, if the person whom the testator thought dead be alive, he shall be the executor.[3] Where the testator named his wife executrix, and A B to assist her, A B was held to be executor by the tenor.[4] In *In the goods of Brown*,[5] the testator executed a will containing a clause to the effect,—"I appoint my sister, A B, executrix, only requesting that my nephews C D and E F will kindly act for and with her;" and it was held that the nephews were executors according to the tenor.[6]

The appointment of an executor may be either absolute or qualified. It may be limited in point of time, as to when the executor shall begin to exercise his office,—*e. g.*, upon the death or marriage of his son; or as to when he shall cease to act, as during the minority of his son or widowhood of his wife; or it may be limited in point of place, as where the testator has property in different countries and appoints different executors in each country; or it may be limited as to the subject-matter.[7] Again, the appointment may be conditional,—*e. g.*, on condition that the person named shall give security to pay the legacies and in general to perform the will, before he acts as executor.[8]

Where several executors are appointed by the will, whether by express appointment or by implication, probate may be granted to them all simultaneously or at different times,[9] for the powers of all may in the absence of any direction to the contrary be exercised by any one of them who has proved the will.[10] They are all considered in the right of an individual person and by consequence the acts of any one of them in respect of the administration of the effects are deemed to be acts of all.[11]

[1] *Hemfry* v. *Hemfry*, 4 Moore's P. C. C., 33.

[2] *In the goods of Fry*, 1 Hagg., 80, see *In the goods of Adamson*, L. R., 3 P. and D., 253.

[3] Godolph., Pt. II, c. 5, s. 3, cited in Williams on Executors, 246.

[4] *Powell* v. *Stratford*, cited in Phillim., 118; Williams on Executors, 248.

[5] L. R., 2 P. Div., 110.

[6] Intestate and Testamentary Succession in India, pp. 211, 212

[7] *Lynch* v. *Bellew*, 3 Phillim., 424. See *In the goods of Wakeham*, L R., 2 P. and D., 395; *Rose* v. *Bartlett*, Cro. Car., 293, and Williams on Executors, pp. 253-4-5-6; see also s. 219 of the Indian Succession Act.

[8] Williams on Executors, 256.

[9] Indian Succession Act, s. 184; Act V of 1881, s. 9.

[10] Indian Succession Act, 271; Act V of 1881, s. 92.

[11] Williams on Executors, 950.

A testator may appoint several persons as executors in several degrees, as where he makes his wife sole executrix, but if she will not, or cannot, be executrix, then he makes his son executor; and if his son will not, or cannot, be executor, then he makes his brother, and so on.[1] Thus, in *In the goods of Lane*,[2] the testator appointed his son sole executor; but, in the event of his going abroad, or being and remaining abroad for upwards of two calendar months, he appointed B his executor. The son, after the death of the testator, went abroad without taking probate, and there remained. The Court granted probate to B, but reserved power to the son to prove the will.[3]

If two or more papers are entitled to probate as containing the last will of the deceased, each person named executor in the several papers is entitled to probate, unless his appointment is in any way repealed by a paper executed subsequently to that in which he is named.[4] Although the Court is always reluctant to exclude from probate executors whose appointment is revoked only by inference,[5] yet, where a testator by his will appointed W. L. and W. B. executors, and in a codicil named his wife "sole executrix of this my will," the Court held that the appointment of the widow was tantamount to a revocation of the appointment of the executors appointed by the will, as otherwise it was impossible to give effect to the word "sole."[6] In *In the goods of Leese*,[7] it was argued that the re-appointment in a subsequent will of one of the executors named in a former will (which was not revoked) with a new co-executor amounted to a revocation of the appointment of the executors in the former will, but it was held that there was no such implied revocation.

If after the grant of probate a codicil be discovered, a separate probate of that codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the will. If different executors are appointed by the codicil, the probate of the will must be revoked, and a new probate granted of the will and the codicil together.[8]

[1] Williams on Executors, 249.

[2] 33 L. J., P. and M., 185.

[3] See *In the goods of Wilmot*, 2 Rob., 579, and *In the goods of Langford*, L. R., 1 P. and D., 458; *In the goods of Foster*, L. R., 2 P. and D., 304. See s. 219 *et seq.*, of the Indian Succession Act, and the corresponding sections of the Probate and Administration Act, as to appointment of executors for a limited purpose.

[4] See *In the goods of Morgan*, L. R., 1 P. and D., 323; *In the goods of Donaldson*, L. R., 3 P and D., 45; *Lemage* v. *Goodban*, L. R., 1 P. and D., 57; and *In the goods of Petchell*, L. R., 3 P. and D., 153.

[5] *Per* Sir J. P. Wilde, *In the goods of Lowe*, 3 Sw. and Tr., 478.

[6] *Ibid.* See also *In the goods of Baily*, L. R., 1 P. and D., 628.

[7] 31 L. P. and M., 169.

[8] Indian Succession Act, s. 185. This section, which is also incorporated in the Probate and Administration Act, V of 1881, of which Act it is s. 10, is transcribed almost *verbatim*

Where one of several executors to whom probate has been granted dies, the entire representation of the testator accrues to the surviving executor or executors.[1] Even, where probate has not been granted, the office becomes vested in the survivor or survivors.[2] In the case, too, of the death of one or more of several administrators the office becomes vested in the surviving administrator or administrators.

Section 187 of the Indian Succession Act provides that no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under s. 180 of the Indian Succession Act, *i. e.*, in a case where a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the Province, whether in British dominions or in foreign territory and a properly authenticated copy of the will is produced.[4] Section 187 of the Indian Succession Act has not been incorporated in the Probate and Administration Act, but, as already stated, it has been retained in the Hindu Wills Act, and, by that Act, it still applies to Hindus, Jainas, Sikhs and Buddhists within the territorial limits to which that latter Act applies. Accordingly, it would seem, the section has no application in case of Hindus, Jainas, Sikhs and Buddhists outside the Presidency towns and Lower Bengal. It follows, therefore, that in the territories outside the limits to which the Hindu Wills Act is applicable there is no law in force which obliges a person, to whom the Indian Succession Act does not apply, claiming under a will to obtain probate of the will, or otherwise to establish his right as executor or administrator or legatee, to obtain probate before he can sue in respect to any property which he claims under the will.[5] In any suit or proceeding instituted by him, it has been held, it is for the Court, in which the suit or proceeding is pending, to determine for the purpose of such suit or proceeding whether the will is genuine and valid and confers on the plaintiff or applicant the right which he claims.[6] It follows, also, that an executor of a Mahomedan will may establish his right under the will without taking out probate.[7]

from Cooto's Probate Practice, p. 53. The cases there cited are *Langdon* v. *Rooke*, 1 Notes of Cases, 254; and *Beatson*, 6 Notes of Cases, 13.

[1] Indian Succession Act, s. 186; Act V of 1881, s. 11.

[2] Indian Succession Act, s. 272; Act V of 1881, s. 93.

[3] *Ibid.*

[4] Section 180 of the Indian Succession Act corresponds with s. 5 of Act V of 1881.

[5] *Bhagvansang* v. *Bechavdas Harjivandas*, I. L. R., 6 Bom., 73; *Krishna Kinkur Roy* v. *Rai Mohun Roy*, I. L. R., 14 Cal., 37. But now see Act VII of 1889, ss. 1 (4), 4 and 21.

[6] *Ibid.*

[7] *Shaik Moosa* v. *Shaik Essa*, I. L. R., 8 Bom., 241; Now see Act VII of 1889, ss. 1 (4), 4 and 21 as to the necessity, in certain cases, for the production of probate or letters of administration

The word "province" used in section 187 of the Indian Succession Act, includes any division of British India having a Court of last resort.[1] Therefore, where a testator died in the Punjab and his executor, without having obtained probate, granted a power of attorney to administer to the estate to a person in Calcutta who applied for and obtained letters of administration with the will annexed from the Calcutta High Court, it was held, that, under this section, such letters had been wrongly granted. It was held, however, that letters might be granted to the Administrator-General of Bengal.[2]

As regards the Administrator-General of any of the Presidencies, the High Court at each Presidency-town is to be deemed a Court of competent jurisdiction within the meaning of sections 187 and 190 of the Indian Succession Act.[3]

Where a will, not made within the province, has been proved in a Court of competent jurisdiction, it is not necessary, in order to establish a right as executor or legatee, to prove the will again within the province. It is sufficient to obtain letters of administration with a copy of a copy properly authenticated by the Court by which probate has already been granted.[4]

Where a Hindu testator by his will, executed after the Hindu Wills Act came into force, directed such portion of his estate as his executor might direct to be applied in a particular way, and did not dispose of the residue, and the executor renounced, and the sole heiress of the testator thereupon filed a suit for construction of the will,—it was objected that probate has not been taken out, and that under section 187 of the Indian Succesion Act, the plaintiff could not enforce any right under the will. WHITE, J., however, allowed evidence of the execution of the will to be given, declared the gift to be void for uncertainty, and directed the usual administration accounts to be taken.[5]

It may be noticed that if a will were made in a foreign country and proved there, disposing of personal property in England, it was necessary for the executor to prove it in England also.[6]

We have seen that the whole of the property of a deceased person vests in his executor or administrator,[7] and by s. 437 of the Civil Procedure Code Act, XIV of 1882, it is enacted that "in all suits concerning property vested in a trustee, executor or administrator, the trustee, executor or administrator shall represent the persons beneficially interested in such property; and it

[1] Indian Succession Act, s. 3.

[2] *In the goods of Duncan*, 1 B. L. R., O. C., 3; see Administrator-General's Act, II of 1874, ss. 14, 16, 19, and 26, and s. 242 of the Indian Succession Act.

[3] Act II of 1874, s. 14.

[4] See section 180 of the Indian Succession Act.

[5] *Surbomongola Dabee* v. *Mohendronath Nath*, I. L. R., 4 Calc., 508.

[6] *Tourton* v. *Flower*, 3 P. Wms., 369.

[7] Indian Succession Act, s. 179; Act V of 1881, s. 4.

shall not ordinarily be necessary to make such persons parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made such parties."[1]

The effect of probate of a will when granted is to establish the will from the death of the testator and to render valid all intermediate acts of the executor, as such,[2] but although probate establishes the will as from the testator's death, it is merely operative as the authenticated evidence, and not at all as the foundation of the executor's title; for he derives all his title from the will itself, and the property of the deceased vests in him from the testator's death.[3] A grant of probate or of administation is in the nature of a decree *in rem*, and actually invests the executor or administrator with the character which it declares to belong to him. Accordingly, a grant of probate is conclusive against all the world. It may be shown that the grant was revoked, for that is the further act of the same Court; or that it was forged, for that shows it was not the act of the Court at all; or that it was granted by a Court that had no jurisdiction, for then it is a nonentity. But it cannot be shown that the testator was mad or that *the will* was forged, for those facts might have been alleged in opposition to the grant of administration.[4]

An executor may, before probate, act as effectually, in almost all matters relating to his office, as if probate had been granted.[5] In *Wankford* v. *Wankford*,[6] it was held by LORD HOLT, that an act done by an executor is valid, provided the will is ultimately proved, although the executor, who did the act, died without proving the will; and that case was followed in *Brazier* v. *Hudson*.[7] Before probate an executor may seize and take into his hands any of the testator's effects; pay or release debts; distrain for rent due to the estate;[8] sell, release or assign, or otherwise dispose of the testator's effects; assent to or pay legacies.[9] On a sale before probate, however, a pur-

[1] See *Penney* v. *Hunt*, E. R., 6 Ch. D., 98; *Priestman* v. *Thomas*, L. R., 9 P. D., 210; *Bradford* v. *Young*, 26 Ch. D., 656, 29 Ch. D., 617.

[2] Indian Succession Act, s. 188; Act V. of 1881, s 12.

[3] Williams on Executors, 297.

[4] 2 Smith L. C., 827, citing *Noel* v. *Wells*, 1 Lev., 235-6: see *per* BULLER, J., in *Allen* v. *Dundas*, 3 T. R., 125; and *Allen* v *McPherson*, 1 H. L. Ca., 191; see also *Brajanath Dey Sirkar* v. *S. M. Anandamayi Dasi*, 8 B. L. R., 208; *Mitchell* v. *Gard*, 3 Sw. and W., 75, *In re Bywater* L. R., 18 Ch. D., 17; *Melhuish* v. *Milton*, L. R., 3 Ch. D., 27.

[5] *Rogers* v. *James*, 7 Taun., 147; *Wankford* v. *Wankford*, 1 Salk., 301.

[6] 1 Salk., 301.

[7] 8 Sim., 67.

[8] *Whitehed* v. *Taylor*, 10 A. and E., 210.

[9] Williams on Executors, 307.

chaser is not bound to pay his purchase-money until probate has been obtained.[1] Under s. 242 of the Indian Succession Act, probate has effect over all the property and estate moveable and immoveable of the deceased throughout the province in which the same is granted and is conclusive as to the representative title against all debtors of the deceased and all persons holding property which belongs to him. But, as already stated, a grant of probate in the case of wills of Hindus before the Hindu Wills Act, conferred no title upon the executor. The executor derived his title from the will itself, and the probate was merely evidence of his title, as a decree of the Court granting it would be,—that is, between the parties and those privy to the suit in which the decree was made.[2] In the case of a Hindu will, in 1867, KEMP and GLOVER, JJ., held, that although letters of administration with the will annexed might be equivalent to probate, yet that neither was by itself sufficient to prove the genuineness of a will which was contested.[3]

Probate limited to part of the estate of the testator cannot be granted in cases where, under s. 179 of the Indian Succession Act, or s. 4 of the Probate and Administration Act, the whole estate vests in the executor.[4]

The proviso to s. 2 of the Probate and Administration Act provides that no Court in any local area beyond the limits of the towns of Calcutta, Madras and Bombay and the territories for the time being administered by the Chief Commissioner of Lower[5] Burmah, and no High Court in exercise of the concurrent jurisdiction over such local area thereby conferred shall receive applications for probate or letters of administration, until the Local Government has with the previous sanction of the Governor-General in Council, by a notification in the Official Gazette, authorized it so to do. In the Province of Bombay no such notification has yet been published. And, in 1881, it was held that in the Mufussil of the Bombay Presidency, a person claiming under a will is not obliged to obtain probate or otherwise establish his right as executor, administrator or legatee, before he can sue in respect of the property which he claims under the will, but that in any suit or proceeding instituted by him it was for the Court, in which the suit or proceeding was pending, to determine for the purposes of such suit or proceeding whether the will was genuine and valid, and conferred on the

[1] *Newton* v. *Metropolitan Ry. Co.*, 1 Dr. and S., 583. Intestate and Testamentary Succession in India, p. 216.

[2] *Sharo Bibi* v. *Baldeo Das*, 1 B. L. R., O. C., 24. See *Jaykali Debi* v. *Shibnath Chatterjee*, 2 B. L. R. (O. C.), 1. See *Grish Chunder Roy* v. *Broughton*, I. L. R., 14 Cal., p. 875.

[3] *Teen Cowree Dossee* v. *Hureehur Mookerjee*, 8 W. R., 308.

[4] *In re Thaker Madhavji Dharamsi*, I. L. R., 6 Bom., 460.

[5] See Act XX of 1886, ss. 2, 4.

plaintiff or applicant the right which he claimed.[1] Notifications under s. 2 of the Probate and Administration Act have been published authorizing Courts in Bengal,[2] Assam,[3] the Punjab,[4] the Andaman and Nicobar Islands,[5] to receive applications for probate and administration. The Act, together with Act VI of 1881, has also been extended, with certain modifications, to the Hyderabad Assigned Districts,[6] and it has been declared to be in force in certain scheduled Districts, *viz.*, Hazaribagh, Lohardugga, Manbhoom and the Pergunnahs of Dhalbhum and Kalkhan in the District of Singhbhum.[7]

An executor cannot be compelled to accept the office of executor, but he may be called upon to accept or refuse the executorship, and although an executor has his election whether he will accept or refuse the executorship, yet he may determine such election by acts which amount to administration;[8] as where he deals with the goods and effects of the testator in a manner which shows an intention in him to take upon himself the executorship, or, in cases to which the Indian Succession Act applies, does acts which will make a man liable as executor *de son tort*.[9]

Under s. 193 of the Indian Succession Act, when a person appointed an executor has not renounced the executorship, letters of administration cannot be granted to any other person, until a citation has been issued, calling upon the executor to accept or renounce his executorship; but when one or more of several executors have proved a will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved.[10] In England, also, where one or more executors have renounced, it is not necessary, on the death of the surviving executor of those who proved the will, to issue citations to the executors who have renounced.[11] No period is fixed within which the citation is returnable. Under the rules and orders of the High Court at Fort William, citations are returnable in four days from the day of service, if the parties to be cited live within the town of Calcutta or ten miles thereof; and in case the parties live above ten miles from Calcutta, the citation must be made returnable

[1] *Bhagvansang* v *Bechavdas Harjivandas*, L. R., 6 Bom., 73; see *Shaik Moosa* v. *Shaik Essa*, I. L. R., 8 Bom., 241, see *supra*, p. 322.

[2] Cal. Gazette, 20th Ap., 1881, p. 445.

[3] Assam Gazette, 27th Aug., 1881, p. 337.

[4] Punjab Gazette, 6th Oct., 1881, p. 483.

[5] Andaman Gazette, 17th June, 1881. Gazette of India, 28th May, 1881, Part I, p. 214.

[6] Gazette of India, 5th Nov., Part I, p. 540.

[7] Gazette of India, 22nd Oct., 1881, Part I, p. 504.

[8] Williams on Executors, 280; *Long* v. *Symes*, 3 Hagg., 774.

[9] See s. 265 of the Indian Succession Act.

[10] This section corresponds with s. 16 of Act V of 1881.

[11] *Harrison* v. *Harrison*, 1 Rob., 406; *Venables* v. *E. I. Co.*, 2 Exch., 633.

on such day certain as the Court or a Judge thereof shall direct.[1] Citations, it seems, according to the practice in England, may be by advertisement where the party cited has left the country and has not been heard of, and has no attorney, agent or correspondent.[2]

An executor nominated by the will cannot in part refuse the office. He must entirely refuse or not at all.[3] If he renounce, the renunciation may be made orally in presence of the Judge or by a writing signed by him, and when made will preclude him from ever thereafter applying for probate of the will appointing him executor.[4] An executor who has taken probate, it would seem, cannot renounce.[5]

In England by s. 79 of 20 and 21 Vict. c. 77, the rights of an executor, on his renouncing probate, cease, and the representation of the testator goes as if he had not been named. There a renunciation, it has been held, is not effective until it has been recorded,[6] and in England, a renunciation may be retracted at any time before a grant of administration has passed the seal of the Court,[7] but not afterwards.[8] In *In the goods of Morant*,[9] where an executor by his will renounced probate of the will of his testator, it was held, that until the will was filed, the renunciation was not final, and might be withdrawn.[10]

If an executor fails to accept the office within the time limited by a citation calling upon him to accept or renounce the executorship, or if he renounce, the will may be proved and letters of administration with a copy of the will annexed may be granted to the person who would be entitled to administration in case of intestacy.[11] In cases of intestacy to which the Indian Succession Act applies, if the deceased has left a widow, administration will be granted to her, unless the Court sees cause to exclude her, either on the ground of some personal disqualification, as where she is a lunatic, or has committed adultery, or married again since her husband's death, or because she has no interest in the estate of the deceased, as where by her marriage settlement she has been barred of all interest in her husband's estate.[12] In England, it seems, the Court will not, at any

[1] Belchambers's Rules and Orders, pp. 272, 273.

[2] *Kenworthy* v. *Kenworthy*, 32 L. J., P. and M., 107.

[3] Williams on Executors, 286.

[4] Indian Succession Act, s. 194; Act V of 1881, s. 17.

[5] *In the goods of Veiga*, 32 L. J., P. and M., 9.

[6] *Long* v. *Symes*, 3 Hagg. 771.

[7] *McDonell* v. *Prendergast*, 3 Hagg., 212; *Harrison* v. *Harrison*, 1 Rob., 406.

[8] Williams on Executors, 288.

[9] L. R., 3 P. and D., 151.

[10] *In the goods of Morant*, L. R., 3 P. and D., 151.

[11] Indian Succession Act, s. 195, Act V of 1881, s. 18.

[12] Indian Succession Act, s. 201; see Act V of 1881 ss. 18, 23; see *Webb* v. *Needham*, 1 Add., 494.

rate without notice, pass over the widow, who has been legally separated from her husband by reason of his cruelty, in granting administration to his estate.[1] There, too, it has been held, that where a widow had eloped from her husband, or co-habited in his lifetime with another man,[2] or had lived separate from her husband,[3] there is good cause for excluding her from administration.[4] A divorce by a foreign Court was considered sufficient to exclude a woman from administering to the estate of the husband from whom she has been divorced.[5]

If there be no widow of the intestate, or if the Court see cause to exclude the widow, administration will be granted to the person or persons who would be beneficially entitled to the estate according to the rules for the distribution of an intestate's estate; provided that when the mother of the deceased is one of the class of persons so entitled, she will be solely entitled to administration.[6] Persons who stand in equal degree of kindred to the deceased, are equally entitled to administration.[7] The husband surviving his wife, has the same right of administration to her estate, as the widow has in respect of the estate of her husband.[8]

When, however, there is no person connected with the deceased by marriage or consanguinity who is entitled to letters of administration and willing to act, they may be granted to a creditor.[9] In England, in such a case, a creditor is entitled to administration even where his debt is barred;[10] but, it is the practice, where administration is granted to a creditor whose right of action is barred by limitation, to make a condition that he shall give a bond to distribute the assets *pro rata* among all the creditors,[11] and it is immaterial what the amount of the debt is, except where two or more creditors contend *inter se* for a grant.[12] In *Harrison* v. *All persons in general*,[13] it was said:—"The Court does sometimes grant to more creditors than one, but it prefers that one should be fixed upon."[c] In *In the goods of Smithson*,[14] the Court granted administration to

[1] *In the goods of Ihler*, L. R., 3 P. and D., 50.

[2] *Fleming* v. *Pelham*, 3 Hagg., 217 note (*b*).

[3] *Lambell* v. *Lambell*, 3 Hagg., 568.

[4] Williams on Executors, 423.

[5] *Ryan* v. *Ryan*, 2 Phill., 332; *In the goods of Davies*, 2 Curt., 628; Williams on Executors, 424.

[6] Indian Succession Act, s. 203; see Act V of 1881, ss. 18, 23.

[7] Indian Succession Act, s. 204; see Act V of 1881, ss. 18, 23

[8] *Ibid.*, 205; see Act V of 1881, ss. 18, 23.

[9] *Ibid.*, 206; see Act V of 1881, ss. 18, 23.

[10] *Rhodes* v. *Smethurst*, 6 M. and W., 351; *Coombs* v. *Coombs*, L. R., 1 P. and D., 288.

[11] *Coombs* v. *Coombs*, L. R., 1 P. and D., 288.

[12] Coote's Prob. Pract., 112.

[13] 2 Phill., 249.

[14] 36 L. J., P. and M., 77.

the nominee of the principal creditors of an intestate, upon justifying security and a bond to pay all debts *pro rata* being given. Where the next-of-kin have renounced, and creditors are entitled to administration, the next-of-kin have no right to suggest to the Court which of the creditors should be preferred.[1] and where a creditor has been duly appointed, the next-of-kin cannot, during his lifetime, take the administration from him; but upon his death they may come in and claim administration *de bonis non.*[2]

According to the rules of the High Court at Fort William, in all petitions by creditors for letters of administration, it must be stated particularly how the debt arose, and whether the party has any and what security for the debt; and no administration will be granted to any person claiming as a creditor when the debt arises from the balance, or the supposed balance of an open or unsettled account, or where the creditor has security for the debt.[3] By s. 15 of Act II of 1874, the Administrator-General of the Presidency is entitled to administration in preference to a creditor. Under the present Limitation Act, XV of 1877, s. 28, the debt and not merely the right to recover is barred, and a creditor, therefore, whose debt is barred would not be entitled to a grant of administration.

In cases, to which the Probate and Administration Act applies, where the executor has renounced or failed to accept the executorship, letters of administration with a copy of the will annexed may be granted to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate, and when several such persons apply for administration, it is in the discretion of the Court to grant it to any one or more of them. But when no such person applies, it may be granted to a creditor of the deceased.[4]

It will be observed that the rules under the Succession Act upon this branch of subject are based in part on a law of succession differing from that of the classes to which the Probate and Administration Act applies. It was therefore impossible to incorporate these rules in the latter Act, which follows the broad rule that the grant shall follow the interest.

When the deceased has made a will, but has not appointed an executor, or when he has appointed an executor who is legally incapable or refuses to act, or has died before the testator, or before he has proved the will, or when the executor dies after having proved the will, but before he has administered

[1] *Ibid.*, *per* SIR J. P. WILDE.

[2] *Skeffington* v. *White*, 1 Hagg., 702.

[3] Rule 683, Belchambers's Rules and Orders, p. 272.

[4] Act V of 1881, ss. 18, 23.

all the estate of the deceased, an universal or residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate or of so much thereof as may be unadministered.[1] The reason for the preference of the residuary legatee is given by SIR J. NICHOLL, who observes: "The residuary legatee is the testator's choice; he is the next person in his election to the executors.[2] Inasmuch, too, as his bequest can have no realization until all the debts and all the other legacies have been paid, he is influenced above all other legatees, if honestly inclined, in effecting a faithful and complete administration of the estate."[3] Even where there is no prospect of any residue, the residuary legatee is entitled to administration in preference as well to the next-of-kin,[4] as also to the legatees and annuitants.[5] So he is entitled though he be only residuary legatee in trust for others.[6] But where a residuary legatee, who is merely a trustee, fails to represent a testator, the practice in England is to grant letters of administration, not to his representative, but to such person or persons as have the beneficial interest in the residuary estate.[7] If there be several residuary legatees, any one may take administration without the consent of, or notice to, the others.[8]

It has already been observed that, in England, where the executor dies leaving a will, after having proved the will of his testator, but before he has administered all the estate, his executorship devolves upon his executor. It is not so, however, in India.[9] Here, in such a case, a new representative may be appointed for administering to such part of the estate as is unadministered.[10] But while an executor of an executor is not derivative executor of the original testator, and thus entitled to administer to the testator's unadministered effects, where a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been fully administered, his representative has the same right to administration with the will annexed as the residuary legatee

[1] Indian Succession Act, s. 196; Act V of 1881 s. 19.

[2] *Atkinson* v. *Barnard*, 2 Phill., 318.

[3] *Repington* v. *Holland*, 2 Lee, 250; Coote's Prob. Pract., 65.

[4] *Thomas* v. *Butler*, 1 Ventr., 217.

[5] *Atkinson* v. *Barnard*, 2 Phill., 318.

[6] *Hutchinson* v. *Lambert*, 3 Add., 27; Williams on Executors, 470-471.

[7] *Hutchinson* v. *Lambert*, 3 Add., 27.

[8] Coote's Prob. Pract., 66; *Taylor* v. *Shore*, Jones, 162. Intestate and Testamentary Succession in India, p. 223.

[9] *DeSouza* v. *Secretary of State*, 12 B. L. R., 423; *Behary Lall Sandyal* v. *Juggomohun Gossain*, I. L. R., 4 Calc., 5; (S. C.) 2 C. L. R., 422. Intestate and Testamentary Succession in India, p. 223.

[10] Indian Succession Act, s. 229; Act V of 1881, s. 45.

had.[1] So, apparently, if an executor be also residuary legatee having a beneficial interest, and die before probate, or intestate, before he has fully administered the estate, administration with the will annexed may be granted, not to his next of kin, but to his personal representative.[2]

In the case of *In the goods of Radhika Mohun Sett*,[3] probate of a Hindu will was granted to a universal legatee as executrix by implication, there being no executor appointed by the will, but in granting probate to the universal legatee, it was stated, that the applicant was at least entitled to administration with the will annexed.[4] In England, it does not seem to have been the practice to grant probate to a universal legatee.[5]

Under s. 198 of the Indian Succession Act, corresponding with s. 21 of the Probate and Administration Act, when there is no executor and no residuary legatee or representative of a residuary legatee, or he declines, or is incapable, to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased, if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.[6] If none of the persons, to whom, under that section, administration may be granted, appear and entitle themselves to probate of a will or to a grant of letters of administration, or if a person, who entitles himself to a grant of administration, neglects to give such security as may be required of him by law, or according to the practice of the Court, the Court may grant letters of administration to the Administrator-General of the Presidency;[7] and the Administrator-General will be deemed to have a right to letters of administration in preference to that of any person merely on the ground of his being a creditor, or a legatee other than an universal legatee, or a friend of the deceased.[8]

Letters of administration with the will annexed or otherwise will in no case be granted to any person who is a minor or is of unsound mind, nor to a married woman, in cases to which the Indian Succession Act is applicable, without the previous consent of her husband.[9] Nor will such letters be granted to any legatee other than an universal or a residuary legatee, until a citation has been

[1] Indian Succession Act, 197; Act V of 1881, 20; see Williams on Executors, 47; *Jones v. Beytagh*, 3 Phill., 635.

[2] See *Isted v. Stanley*, Dyer, 272 (*a*); Williams on Executors, 471.

[3] 7 B. L. R., 563.

[4] *In the goods of Radhika Mohun Sett*, 7 B. L. R., 563.

[5] See *In the goods of Oliphant*, 1 Sw. and Tr., 525; see *Androvin v. Poilblanc*, 3 Atk., 298.

[6] Indian Succession Act, s. 198; Act V of 1881 s. 21.

[7] Act II of 1874. s. 20.

[8] Act II of 1874, s. 15.

[9] Indian Succession Act, s. 189; Act V of 1881, s. 13.

duly issued and published, calling on the next-of-kin to accept or refuse letters of administration,[1] the general rule being that when a person has a prior title to a grant he must be cited before administration is committed to any other.[2] Thus, as we have seen, where there is an executor, administration will not be granted to any other person until a citation has been issued calling upon the executor to accept or renounce the executorship.[3] A legatee or creditor must cite both the executor and the residuary legatees, or the next-of-kin, if the residue has not been disposed of.[4] Under s. 15 of Act II of 1874, where a creditor applies for administration, a citation must, it seems, be issued to the Administrator-General. Under the rules of the High Court at Fort William also, "where a creditor applies, a special citation shall issue to the widow, if any, and next-of-kin, provided they shall be resident within the jurisdiction or have any known agent within the jurisdiction; and a general citation shall also issue to all persons interested in the goods of the deceased, and all such citations shall be served personally upon such known agents, when they are within the jurisdiction:"[5]—and "when a widow applies for administration, a citation shall issue to the next-of-kin; and when the next-of-kin applies, a citation shall issue to the widow, if any, and another to the next-of-kin next entitled."[6]

The brother of the deceased, the father being alive, has no interest in the goods of the deceased, and consequently has not a title to administer equal to that of a creditor or legatee.[7]

According to the rules of the High Court at Fort William, citations are returnable within four days from the date of service, if the parties to be cited live within the town of Calcutta or ten miles thereof. If the parties live beyond that distance, the time within which the citation is returnable is at the discretion of the Court.[8]

Grants of Probate may be limited in duration, but a grant though limited in duration will be general in its powers and application. Thus, where a will

[1] *Ibid.*, s. 199; Act V of 1881, s. 22.

[2] Williams on Executors, 474.

[3] Indian Succession Act, s. 193; Act V of 1881, s. 16.

[4] Coote's Prob. Pract., 225.

[5] Belchambers's Rules and Orders, p. 272.

[6] Belchambers's Rules and Orders, p. 271. Intestate and Testamentary Succession in India, p. 223.

[7] *In the goods of Smallwood*, MSS., July 20th, 1868, *per* NORMAN, J. cited in Belchambers's Rules and Orders, p. 271.

[8] Belchambers's Rules and Orders, p. 272. Intestate and Testamentary Succession in India, p. 223. As to the issue and publication of citations, see s. 250 of the Indian Succession

has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy until the original or a properly authenticated copy is produced.[1] So, where a codicil has been lost since the death of the testator without a copy having been made, or the draft kept, and its contents or substance cannot be shown, the Court will grant probate of the will limited, until the original codicil or an authentic copy thereof shall be brought in.[2]

The contents of a lost will or codicil, like those of any other lost instrument, may be proved by secondary evidence,[3] and declarations, whether written or oral, made by a testator both before and *after* execution of his will are, in the event of its loss, admissible as secondary evidence of its contents.[4] In the case of *Sugden* v. *Lord St. Leonards*, which overruled the case of *Quick* v. *Quick*,[5] the contents of a lost will were held to be proved by the evidence of a single witness, who was interested, but whose veracity and competence were unimpeached.[6] In *Burls* v. *Burls*,[7] evidence of the contents of a lost will was supplied by the production of the draft and of parol testimony of persons who had read the will. SIR J. P. WILDE held, that the parol evidence must be placed side by side with the draft, and out of them together the Court must extract the contents of the will to be proved. In that case the executrix, it may be observed, was condemned in costs, it having been through her negligence that the original will was lost.

If probate is sought of a will which has been destroyed in the lifetime of the testator, it must of course be proved that it was by mistake or without his privity or consent,[8] for, as we have seen, where the will has been left in the possession of the testator himself, the legal presumption is that he destroyed it himself, *animo revocandi*.[9] If a person who has himself destroyed a testamentary paper, after the death of the alleged testator, asks for probate of the substance of the will as contained in a copy or otherwise, the Court will expect the

Act. *Kenworthy* v. *Kenworthy*, 32 L. J., P. and M., 107; Belchambers's Rules and Orders, p. 273.

[1] Indian Succession Act, s. 208; Act V of 1881, s. 24.

[2] Coote's Prob. Pract., 124-5.

[3] *Issur Chunder Surmah* v. *Doyamoye Debea*, I. L. R., 8 Cal. 864; *Sugden* v. *Lord St. Leonards*, L. R., 1 P. Div., 154; see *Brown* v. *Brown*, 8 E. and B., 876.

[4] See *Johnson* v. *Lyford*, L. R. 1 P. and D. 546, *Sugden* v. *Lord St. Leonards*, L. R., 1 P. Div., 154 (COCKBURN, C. J., JESSEL, M. R., JAMES, L. J., and BAGGALLAY, L. J. A., MELLISH, L. J., dissenting as to declarations made after the execution of the will.

[5] 3 Sw. and Tr., 442.

[6] See *Gould* v. *Lakes*, L. R., 6 P Div., 1.

[7] L. R., 1 P. and D., 472.

[8] *Davis* v. *Davis*, 2 Add., 224; *Trevelyan* v. *Trevelyan*, 1 Phill., 149.

[9] *Ibid.*, 226.

fullest and most satisfactory proof of all the facts necessary to be established.[1] And, in all cases where probate is asked of the contents of a will which is not before the Court, the validity of the execution as well as the substance or contents of the will must be satisfactorily proved.[2] If the contents are not wholly proved, probate may be granted to the extent to which they are proved.[3]

Where no copy has been made or draft preserved of a lost will, probate may be granted of its contents if they can be established by evidence as was done in the case of *Sugden* v. *Lord St. Leonards*.[4]

When the will is in the possession of a person residing out of the province[5] in which application for probate is made, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it be produced.[6] This procedure is the same as that followed in similar circumstances in England.[7] The circumstances must be alleged upon affidavit, and if the copy has been transmitted to a person other than the executor, he will be required to join the executor in the affidavit.[8]

If no will of the deceased is forthcoming, but there is reason to believe that there is a will in existence, letters of administration may be granted limited, until the will, or an authenticated copy of it, be produced.[9] Thus, in *In the goods of Metcalfe*,[10] letters of administration were granted until the last will and testament of the deceased (stated by himself, a few days before his death, to be in India), or an authentic copy thereof, should be transmitted from India to England.[11] So, under special circumstances, the Probate Court in England granted probate of certain papers forming part of the will of a deceased, the other papers being in India, reserving power to the executor to prove the other papers, or authentic copies thereof, on his undertaking to do so.[12]

[1] *Moore* v. *Whitehouse*, 3 Sw. and Tr., 567.

[2] *In the goods of Ripley*, 1 Sw. and Tr., 68; *In the goods of Gardner*, 1 Sw. and Tr., 109; Coote's Prob. Pract., 124; see *In re Nobodoorga*, 7 C. L. R., 387; *Issur Chunder Surmah* v. *Doyamoye Debea*, I. L. R., 8 Cal., 864.

[3] *Sugden* v. *Lord St. Leonards*, L. R., 1 P. D., 154; see *Sly* v. *Sly*, L. R., 2 P. D, 91.

[4] See *Issur Chunder Surmah* v. *Doyamoye Debea*, I. L. R., 8 Cal., 864.

[5] See Gazette of India, 5th Nov., 1881, Part I, p. 540, as to Hyderabad Assigned Districts.

[6] Indian Succession Act, s. 210; Act V of 1881, s. 26.

[7] See Coote's Prob. Pract., 125.

[8] *Ibid*; *In re Nobodoorga*, 7 C. L. R., 387.

[9] Indian Succession Act, s. 211; Act V of 1881, s. 27.

[10] 1 Add., 343.

[11] See Williams on Executors, 520, *et seq.*

[12] *In the goods of Roberts*, L. R., 3 P. and D., 110.

In certain cases a grant of probate or of letters of administration may, for the protection of the estate, be granted to persons for the use and benefit of those who are really entitled to the grant. Where an executor is absent from the province,[1] and there is no executor within the province who is willing to act, letters of administration may be granted to his agent or attorney for his use and benefit limited, until he shall himself obtain probate or letters of administration.[2] A similar grant may be made to the agent[3] or attorney of any absent person to whom, if present, letters of administration with the will annexed might be granted.[4] It is necessary in these cases that the agent or attorney should be himself within the jurisdiction of the Court.[5] It seems, however, to be otherwise in England, where an attorney, though resident abroad, may obtain a grant under his power, provided his sureties are resident in England.[6] But, if both principal and attorney reside in the same place out of the jurisdiction, the Court will not make a grant to the attorney.[7] In *In the goods of Leckie*,[8] a British subject died in England possessed of property both in England and in India, leaving a will, by which he appointed four persons to be his executors in England, and W. D. to be his executor in India, "the latter accounting to the former for his intromissions, upon which he will charge a commission of 3 per cent." Probate was granted to the four English executors, but W. D. renounced probate. Thereupon an application was made in India for letters of administration with the will annexed to be granted to the attorney of the four English executors. PHEAR, J., held, that the English executors were intended by the testator to have the power of administering the assets in India as well as in England, and that, therefore, their attorney was entitled to letters of administration.[9]

The words for 'the use and benefit,' in section 212 of the Indian Succession Act and s. 28 of Act V of 1881, do not exclude the claim of those who are beneficially interested; and the person to whom a grant is made for the use and benefit

[1] *i. e.*, any Division of British India having a Court of last resort—Indian Succession Act, s. 3; Act V of 1881, s. 3. As to Hyderabad Assigned Districts, see Gazette of India, 1881, Part I, p. 540.

[2] Indian Succession Act, s. 212; Act V of 1881, s. 28. In the latter Act the word "agent" is substituted for "attorney."

[3] Act V of 1881, s. 29.

[4] Indian Succession Act, s. 213; Act V of 1881, s. 29.

[5] *In the goods of Nesbitt*, 4 B. L. R., App., 49.

[6] *In the goods of Leeson*, 1 Sw. and Tr., 463; but see *In the goods of Reed*, 3 Sw. and Tr, 441.

[7] Coote's Prob. Pract., 128.

[8] 15 B. L. R., 8 App., 8.

[9] See *Velho* v. *Leite*, 33 L. J., P. and M., 107; Intestate and Testamentary Succession in India, p. 231.

of another who is out of the jurisdiction is liable to be sued by the parties beneficially interested in the estate in the same way as if he had obtained letters of administration in his own right.[1] In the case of *Chambers* v. *Bicknell*[2] it was unsuccessfully contended that the attorney was only accountable to his principal. In England, if the attorney be appointed by one only of two or more executors, a grant is made to such attorney to the use and benefit of his constituent, and until he shall duly apply for and obtain probate of the will to be granted to him.[3] It is not necessary to revoke letters of administration granted to an attorney on the principal applying for and obtaining probate, as the grant ceases and expires by the executor returning to the jurisdiction and taking probate.[4]

It is only where the person entitled to probate or letters of administration is absent, that a grant can be made to his attorney or agent. Accordingly, where a person solely entitled to administration is resident within the jurisdiction, the Court will not grant administration to his attorney for his use and benefit.[5] Under special circumstances, however, the Courts have allowed the attorney of a person residing within the jurisdiction to take out administration. Thus, in *In the goods of Bullar*,[6] where the estate was trust property only, administration was granted, in England, to the attorney of the person entitled, though he was living in England. So, in *In the goods of Roberts*,[7] the Court granted administration to the nephew, as the attorney of the person entitled, the latter being of advanced age and unwilling to take upon himself the burden of administration.

According to the rules of the High Court at Fort William when an application is made by the attorney of an executor or administrator resident in England, Scotland or Ireland, or at any other place beyond the jurisdiction of the Court, the original will or an exemplification thereof, or an exemplification of the letters of administration must be annexed to the petition, and the power of attorney must be verified to the satisfaction of the Court or Judge.[8] In England, the attorney of one of many residuary legatees may take administration with the will annexed without notice to the other residuary legatees.[9]

[1] *Chambers* v. *Bicknell*, 2 Hare, 536.

[2] 2 Hare, 536.

[3] Coote's Prob. Pract., 128.

[4] *In the goods of Cassidy*, 4 Hagg., 360; Intestate and Testamentary Succession in India, p. 231.

[5] *In the goods of Burch*, 2 Sw. and Tr., 139.

[6] 39 L. J., P. and M., 26.

[7] 1 Sw. and Tr., 64.

[8] Rule 686, Belchambers's Rules and Orders, p. 273.

[9] Coote's Prob. Pract., 129. See Indian Succession Act s. 199; Act V of 1881, s. 22.

Probate, we have seen, cannot be granted to a minor, and in cases where there is a minor sole executor or residuary legatee, administration may be granted to his legal guardian, or to such other person whom the Court may think fit until he shall have completed his age of majority,[1] and the guardian or other person will have all the powers of an ordinary administrator.[2] Under 12 Car., II, c. 24, ss. 8 and 9, if a sole executor or sole residuary legatee is under age, the person entitled in preference to all others to the grant was the guardian appointed by the will or deed of the father.[3] Next in order is the guardian of the estate (not the person) of a minor appointed by the High Court of Chancery or a guardian appointed by a competent foreign Court. If there be no such guardian, the Court itself will appoint a curator or guardian from the next-of-kin of the minor for the purpose of taking the grant.[4] In England, a natural guardian of a sole minor executor or residuary legatee does not appear to be recognized as entitled, as such, to administration with the will annexed.

In the case of two or more minor executors or two or more minor residuary legatees, the grant will be limited until one of them attain the age of majority, if, in the one case, there is no executor, or, in the other, no residuary legatee, who has attained the age of majority.[5]

Under s. 217 of the Indian Succession Act, if a sole executor or sole universal or residuary legatee, be a lunatic, letters of administration with the will annexed, may be granted to the person to whom the care of his estate has been committed by competent authority; or if there be no such person, to such other person as the Court may think fit to appoint, for the use and benefit of the lunatic, until he shall become of sound mind.[6]

In England, it was the practice of the Ecclesiastical Court to grant administration for the use and benefit of a lunatic, although the person alleged to be so had not been found a lunatic by inquisition; but when such a case occurred, the Court required affidavits stating the fact of lunacy, and that no inquisition had been had, and, of course, no committee appointed. The Court then granted administration to the next-of-kin of the lunatic for the use and benefit of the lunatic pending the lunacy, and it required sureties in double the amount of the property, and such sureties were required to have justified.[7] The Indian Succession Act, also, seems to contemplate administration being granted for the use and

[1] Indian Succession Act, s. 215; Act V of 1881, s. 31.

[2] Indian Succession Act, s. 274; Act V of 1881, s. 95.

[3] See *supra*, p. 80.

[4] *Rich* v. *Chamberlayne*, 1 Lee, 135; *In the goods of Ewing*, 1 Hagg., 381; Coote's Prob. Pract., 129, 130.

[5] Indian Succession Act, s. 216; Act V of 1881, s. 32.

[6] This section is incorporated, as s. 33, in the Probate and Administration Act, with a variation so as to include minors as well as lunatics.

[7] Williams on Executors, 524.

benefit of a lunatic, although he has not been found to be such by a commission, for it provides for the case of there not being a person to whom the care of the estate of the alleged lunatic has been committed; whereas in all cases where a person is adjudged to be of unsound mind under Act XXXV of 1858 (*an Act to make better provision for the care of the estates of lunatics not subject to the jurisdiction of the Supreme Court of Judicature*), a manager of the estate is appointed.[1]

In England, if a sole executor be a lunatic, the production of the commission proves the committee's title to administration and also the lunacy of the ward. If there be two committees, both must take, or one must renounce.[2] If the committee consent,[3] or, if there be no committee, the grant will be made to the residuary legatee.[4] If a residuary legatee be a lunatic (there being no executor), the grant will be made to the committee of his estate, if he have one, or to the next-of-kin; but the next-of-kin must file a declaration and give justifying security.[5]

An administrator of the estate of a deceased person may be appointed *pendente lite*, where a suit is pending touching the validity of the will of the deceased or for obtaining or revoking any probate or any grant of letters of administration.[6] Such an administrator, like a similar administrator appointed under s. 70 of the English Probate Act,[7] has all the rights and powers of a general administrator except the right of distributing the estate, and, like a receiver, he is subject to the immediate control of the Court and must act under its direction.

Probate limited in respect of the extent of the authority of the executor cannot ordinarily be granted except where the will itself limits the interest of the executor.[8] If the executor be appointed for a limited purpose specified by the will, the probate will be limited to that purpose, and if he should appoint an attorney to take administration on his behalf, the letters of administration with the will annexed will be limited in like manner.[9] So, where an executor appointed generally gives an authority to an attorney to prove a will on his behalf, and

[1] See also Act XXXIV of 1888. Act XXXV of 1858 has been, by Act XV of 1874, declared to apply to the whole of British India except the Scheduled Districts.

[2] Coote's Prob. Pract., 135. *In the goods of Phillips*, 2 Add., 336, note *(b)*.

[3] *In the goods of Milnes*, 3 Add., 55.

[4] Coote's Prob. Pract., 136.

[5] *Ibid.* Intestate and Testamentary Succession in India, p. 234.

[6] Indian Succession Act, s. 218; Act V of 1881, s. 34.

[7] 20 and 21 Vict., c. 77.

[8] *Smith* v. *Sutton*, 1 Lee. Eccls., Case, 275; see *In re Thaker Madhavji Dharamsi*, I. L R., 6 Bom., 460.

[9] Indian Succession Act, s. 219; Act V of 1881, s. 35; see Coote's Prob. Pract., 142.

the authority is limited to a particular purpose, the letters of administration with the will annexed shall be limited to that purpose.[1] In other words, the grant follows the terms of the power.[2] In *In the goods of Cooper*,[3] where the testator directed that her will was to take effect only in a particular event, which had not happened, but might happen, the Court granted general probate.

Under s. 223 of the Indian Succession Act, corresponding with s. 39 of the Probate and Administration Act, where probate or administration has been granted, if, at the expiration of twelve months from the date of the probate or administration, the executor or administrator to whom the same has been granted is absent from the province within which the Court that has granted the probate or administration is situate, such Court may grant to any person whom it may think fit, letters of administration limited to the purpose of becoming and being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect. This provision is founded upon ss. 1 and 3 of Statute 38 Geo. III, c. 87. That Statute applied only to executors;[4] but it was afterwards made applicable in similar circumstances to all cases where letters of administration had been granted by the English Probate Act.[5]

If the original executor or administrator return he ought to be made a party to a suit in the usual course; the proceedings are not to be put an end to, but the temporary administrator may account, have costs, and be discharged.[6] But payment of a debt to an administrator appointed during the absence of an executor is a good payment, even after the return of the executor, provided the debtor who paid the money had no notice of the return.[7]

It would seem that the authority of an administrator appointed under section 223 of the Indian Succession Act would not become void upon the death of the executor or administrator,[8] as the grant is made, not for a limited time, but for a limited purpose,—*viz.*, for the purpose of the person appointed becoming a party to a suit and carrying the decree which may be made therein into effect.[9]

[1] *Ibid.*, s. 220; Act V of 1881, s. 39; Cooto's Prob. Pract., 148, 149.

[2] *In the goods of Goldsborough*, 1 Sw. and Tr., 295, *per* SIR C. CRESSWELL.

[3] 1 Deane, 9.

[4] *In the goods of Harrison*, 2 Rob., 184.

[5] 20 and 21 Vict., c. 77, s. 74.

[6] Williams on Executors, 516.

[7] *Walker* v. *Woollaston*, 2 P. Wms. 579, citing *Hodge* v. *Clare*. 4 Mod., 14.

[8] *Taynton* v. *Hannay*, 3 Bos. and Pull., 26.

[9] *Rainsford* v. *Taynton*, 7 Ves, 160. Intestate and Testamentary Succession in India, pp. 238-9.

In any case in which it may appear necessary for preserving the property of a deceased person, the Court, within whose district any of the property is situate, may grant, to any person whom it may thing fit, letters of administration limited to the collection and preservation of the property of the deceased, and giving discharges for debts due to his estate, subject to the directions of the Court,[1] and it may do so, apparently, where the deceased has left a will, but there is no executor appointed, or no executor present competent or willing to act. A person to whom such letters are granted is ordinarily termed an administrator *ad colligenda bona*. In such a case if it is for the benefit of those who may be found entitled, the administrator may be directed to dispose of the property by sale.[2]

In the case of *In the goods of Stewart*,[3] the estate consisted of timber, which was likely to deteriorate, and of trade debts, and the Court made a grant *ad colligenda bona* to a creditor; but directed that, after payment of necessary charges, the balance should be deposited in the registry until a general grant should issue.

Grants *ad colligenda bona* have been made limited to the sale of a ship, to the protection of cargo or other matters relating thereto, to sums due and to become due on bills of exchange,[4] and to the renewing a lease which would expire before a general grant could be made.[5] Administration of this nature may be granted, not only to any one whom the Court considers for the occasion eligible, but to the persons who are entitled to a full grant, or to entire strangers whom mere chance has brought into the matter.[6]

By section 225 of the Indian Succession Act, corresponding with s. 41 of the Probate and Adminstration Act, it is provided that when a person has died intestate, or leaving a will of which there is no executor willing and competent to act, or where the executor shall, at the time of the death of such person, be resident out of the province, and it shall appear to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof, other than the person who under ordinary circumstances would be entitled to a grant of administration, it shall be lawful for the Judge, in his discretion, having regard to consanguinity, amount of interest, the safety of the estate, and probability that it will be properly administered, to appoint such person as he shall think fit to be administrator, and in every such case letters of administration may be limited or not, as the Judge shall think it.

[1] Indian Succession Act, s. 224; Act V of 1881, s. 40.

[2] *In the goods of Schwerdtfeger*, L. R., 1 P. D., 424.

[3] L. R., 1 P. and D., 727.

[4] Coote's Prob. Pract., 157; see *In the goods of Don M. Gudolle*, cited 3 Sw. and Tr., 22.

[5] *In the goods of Clarkington*, 3 Sw. and Tr. 380.

[6] Coote's Prob. Pract., 156; see also pp. 157 and 158.

The section is founded upon s. 73 of the English Probate Act of 1827.[1] In the English Act, however, the words are "and it shall appear to the Court to be necessary or convenient *in any such case by reason of the insolvency of the estate of the deceased or other special circumstances;*" but it has been said that the insolvency of the estate is given merely as an example of the special circumstances which might induce the Court to grant administration under the section.[2] Insolvency, it is to be observed, is not mentioned in the Indian Acts as a special circumstance which might render it necessary or convenient to make a grant, but is probable that where it did exist the Courts here would follow the English cases, and treat it as a special circumstance requiring them to act. The Act gives a large discretion. In *In the goods of Farrands*,[3] the deceased, who was a paper-maker, was alleged to be insolvent and his next-of-kin was a woman in a low position in life, and quite unfitted to carry on, or wind up the business, and the Court, therefore, granted administration to a principal creditor who applied for the same with the sanction of the other creditors. There seems, however, to be some conflict of opinion whether s. 73 of the English Probate Act is applicable, except where the estate of the deceased is insolvent. In one case SIR C. CRESSWELL considered that section 73 of the English Probate Act was wholly inapplicable to a case where there were persons entitled to administration, and no insolvency of the estate of the deceased. "To apply the section under these circumstances," he said, "would be a mere arbitrary selection on the part of the Court,"[4] and in *Hawke* v. *Wedderburne*,[5] SIR J. P. WILDE, said, "Where there is any doubt as to the fact of the insolvency, the Court clearly ought not to pass over the persons entitled under the statute in case of intestacy or under a will, although the 73rd section (of 20 and 21 Vict., c. 77) may perhaps be wide enough to give it power to do so."[6]

According to the English practice a general statement made upon affidavit that it is necessary for the preservation of the personal estate and effects of the deceased, that administration should be granted, will not be sufficient to justify a grant. The Court must be satisfied that it is necessary and convenient that the grant should be made,[7] and unless there are special circumstances to justify it no

[1] 20 and 21 Vict., c. 77.

[2] *In the goods of Farrands*, L. R. 1 P. Div., 441, *per* HANNEN, J, but see *Haynes* v. *Mathews*, 1 Sw. and Tr., 462; and *Hawke* v. *Wedderburne*, L. R., 1 P. and D., 594.

[3] L. R., 1 P. Div., 441.

[4] *Haynes* v. *Mathews*, 1 Sw. and Tr., 462, p. 462.

[5] L. R., 1 P and D., 594.

[6] See *Dabbs* v. *Chisman*, 1 Phill, at p. 159; *Elme* v. *DaCosta*, 1 Phill., at p. 177; *Menzies* v. *Pulbrook*, 2 Curt, at p. 848, as to the principles on which grants are made to creditors. For cases in which administration has been granted in England under s. 73 of 20 and 21 Vict., c. 77, see Intestate and Testamentary Succession in India, p. 241.

[7] *In the goods of Cooke*, 1 Sw. and Tr., 267.

grant can be made. Thus, in *In the goods of White*,[1] the persons entitled to administration could not be communicated with by reason of the blockade of the ports of the Southern States, but the Court refused to grant administration to another as the property was not perishable.

Under certain circumstances the Court may admit portion of a will only to probate, as where a particular clause has been inserted by fraud in the will of the testator during his lifetime,[2] or by forgery after his death,[3] or if it appears that the testator had been induced by fraud to make it part of his will.[4] In such cases probate, or letters of administration with the will annexed, is granted excepting the particular clause.[5] So, where words or clauses have been introduced into a will by mistake or accident, without the knowledge of the testator, the Court may admit the will to probate omitting such words or clauses.[6] Thus, where a testatrix, having executed a will leaving a portion of her household effects to her daughter, was advised that the bequest to her daughter should be secured to her separate use, and she gave directions that a testamentary paper should be prepared to that effect, a paper was thus prepared purporting to be her last will and testament and containing a clause revoking all former wills, the testatrix not being aware that the paper, which was not read over to her, contained such a clause, and the clause was said to have been inserted *per incuriam* without the instructions or knowledge of the testator, and was omitted from the probate.[7] But, unless words have been inserted by fraud, accident or mistake without the knowledge of the testator, the Court cannot correct the will either by the omission of words or by the insertion of other words.[8]

In England, if a testator appoint one executor for a special purpose, or a specific fund only, and another executor for all other purposes, the latter may take probate, save and except, for that purpose or fund. Or, if there be no such executor, the residuary legatee may take administration (with the will annexed)

[1] 2 Sw. and Tr., 457.

[2] *Burton* v. *Burton*, 3 Phill., 455, note (*b*).

[3] *Plume* v. *Beale*, 1 P. Wms., 191.

[4] *In the goods of Duane*, 2 Sw. and Tr., 590; Williams on Executors, 382.

[5] Indian Succession Act, s. 226; Act V of 1881, s 42. As to circumstances under which the Court will or will not order passages in a will to be excepted from the probate, see *Billinghurst* v. *Vickers*, 1 Phill., 187; *Curtis* v. *Curtis*, 3 Add., 33; *In the goods of Wartnaby*, 1 Rob. Eccl., 423; *Marsh* v. *Marsh*, 1 Sw. and Tr., 528; *In the goods of Forrest*, 2 Sw. and Tr., 334. *In the goods of Sharman*, L. R., 1 P. and D., 661; *In the goods of Honeywood*, L. R., 2 P. and D., 251.

[6] *Harter* v. *Harter*, L. R., 3 P. and D., 11; *Morell* v. *Morell*, L. R., 7 P. Div., 68; *In the goods of Oswald*, L. R., 3 P. and D., 162; *Allen* v. *McPherson*, 1 H. L. Ca., p. 209; *In the goods of Duane*, 2 Sw. and Tr., 590; *Rhodes* v. *Rhodes*, L. R., 7 Ap. Ca., 192.

[7] *In the goods of Oswald*, L. R., 3 P. and D., 162

[8] *Harter* v. *Harter*, L. R., 3 P. and D., 11; see *supra* pp. 81, 85.

of all and singular and effects of the deceased, with the same exception.[1] Probate, however, limited to part of the estate, it was held in Bombay, cannot be granted,[2] the whole estate of the testator being vested in the executor under s. 179 of the Indian Succession Act, and s. 4 of the Probate and Administration Act, and it seems from the judgment of the Bombay Court that this rule is not relaxed by reason of the fact that the person seeking such limited probate is able to get possession of all the property of the testator without the assistance of the Court and that probate is necessary only to enable him to collect a few outstanding debts.[3] A similar rule in case of letters of administration was applied in Bengal. In 1879, in *In the goods of Ram Chand Seal*,[4] it was argued, that inasmuch as it was not compulsory for Hindus to take out letters of administration, letters might be granted to Hindus limited to particular property; but PONTIFEX, J., held, that if Hindus take out letters of administration at all, they must take out general letters.[5]

According to the practice in England, where a testator has made his will for a particular or limited purpose only,—*e. g.*, the administration of a fund vested in himself as trustee, the administration of an estate vested in himself as executor, or the administration of his own property in some particular district or country, and has died intestate as regards all other property of his own or vested in him, the next-of-kin (without waiting for the executor to take the limited probate to which he is entitled under such circumstances) may take administration of all and singular the deceased's effects, save and except what the testator has himself excepted. In like manner, the husband of a testatrix, who has made her will under a power, may take administration, save and except what she had power to dispose of by her will, and has disposed of by it, before the executor proves the will.[6]

In India, a general discretion is given to the Court to grant letters of administration subject to an exception, wherever the nature of the case requires an exception to be made.[7] Where a grant, with an exception, of probate or letters of administration, with or without the will annexed, has been granted, and there is other estate of the deceased, the person entitled to probate or administration of the remainder of the deceased's estate may take a grant of probate or letters of administration, as the case may be, of the rest of the deceased's

[1] Coote's Prob. Pract., 160.

[2] *In re Thaker Madhavji Dharamsi* I. L. R., 6 Bom., 460.

[3] *Ibid.*

[4] I. L. R., 5 Calc., 2; (S. C.) 4 C. L. R., 220.

[5] See *In the goods of Grish Chunder Mitter*, I. L. R., 6 Cal., 483; *In the goods of Cowar Suttya Krishna Ghosal*, I. L. R., 10 Cal., 554.

[6] Coote's Prob. Pract., 161.

[7] Indian Succession Act, s. 227; Act V of 1881, s. 43.

estate.[1] Such a grant of the rest, or a grant *cæterorum*, as it is technically designated, is a grant of probate or administration following upon a limited grant.

We have seen that when an executor dies after having proved the will, but before he has administered all the estate of the deceased, an universal or residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate or of so much thereof as may be unadministered.[2] As the executor of an executor is not, in India, derivative executor of the original testator, upon the death of the executor or administrator of a deceased person, the estate of the latter is absolutely unrepresented until some one comes forward and gets a grant of letters of administration.[3] The new representative who may be appointed to administer such part of the estate of the testator as may be unadministered on the death of the executor is technically called administrator *de bonis non*, or *de bonis non administratis*. In all cases where an executor dies without having administered the estate fully, a new representative of the estate may be appointed;[4] and in making a grant in such a case, the Court is to be guided by the same rules as apply to original grants, and must grant letters of administration to those persons only to whom original grants might have been made.[5] So, where a limited grant has expired by effluxion of time, or the happening of the event or contingency on which it was limited, and there is still some part of the deceased's estate unadministered, letters of administration will be granted to those persons to whom original grants might have been made.[6] This form of supplemental grant, although only required where the deceased's estate has not been fully administered, is distinguished from a grant *de bonis non* as being a re-grant of the whole of the deceased's estate just as it was sworn to, and embraced by, the original grant. Accordingly, the estate, on the second grant being applied for, must be sworn under the same amount as that for which the original grant was taken, though a part of the estate may actually have been disposed of by the first grantee.[7] The following are examples of cases in which supplemental grants may be made:[8]—(1.) Where an executor has been appointed for a limited period, and that period has elapsed, a substituted executor, if there be such, takes probate. (2.) Where administration (with

[1] Indian Succession Act, s. 228; Act V of 1881, s. 44.

[2] Indian Succession Act, s. 196; Act V of 1881, s. 19.

[3] *DeSouza* v. *Secretary of State*, 12 B. L. R., 423.

[4] Indian Succession Act, s. 229; Act V of 1881, s. 45; *DeSouza* v. *Secretary of State*, 12 B. L. R., 423.

[5] Indian Succession Act, s. 230; Act V of 1881, s. 46.

[6] Indian Succession Act, s. 231; Act V of 1881, s. 47.

[7] *Abbott* v. *Abbott*, 2 Phill., 578. See *In the goods of Fozard*, 3 Sw. and Tr., 175; Coote's Prob. Pract., 171.

[8] See Coote's Prob. Pract., 172, 173.

the will annexed) has been granted for the use and benefit of a lunatic executor, the grant ceases on the executor becoming sane, and he is entitled to probate. (3.) If in the last case the administrator should have died, further administration for the use and benefit of the executor is granted. If, however, the lunatic should have died, the grant of the administration ceases, and administration with the will annexed is granted to the person entitled thereto. (4.) A similar course is followed in the analogous case of a grant of administration to a guardian for the use and benefit of an executor during his minority. (5.) Where administration has been granted to the attorney of the executor, it ceases on the latter duly applying for, and obtaining probate of the will. It also ceases on the death of the attorney. (6.) When probate has been granted of the substance of a will limited until the original will or an authentic copy thereof be brought into the registry, the grant ceases on the original or an authentic copy thereof being discovered and brought into the registry, and the executor will take probate of the original or of the authentic copy as the case may be. So, if administration is granted *pendente lite*, it ceases on the determination of the suit.

Where it is found that errors in names or descriptions have crept into the grant, as where names have been misspelled, or the status of the deceased misstated, or where the time and place of the deceased's death has been misrepresented, or the purpose of a limited grant wrongly recited, the errors or misdescriptions may be rectified by the Court, and the grant of probate or letters of administration may be altered accordingly.[1] The practice, in England, is to bring such errors to the notice of the Court by affidavit.[2] Alterations in respect of names or descriptions are not confined to those of the testator, but may be made in regard also to executors or administrators where omissions or mistakes have been made.[3] If the original grant be lost or inaccessible, a notation or alteration may be made on an exemplification of it.[4] In the case of *In the goods of White*,[5] a probate was amended by inserting the word 'Ward' instead of that of 'White.' In another case, the Court allowed a probate to be amended, after it had issued, by the addition of a fuller description of the testator than was given therein in the first intance.[6] In *In the goods of Allchin*,[7] the Court directed a memorandum to be endorsed on a probate,

[1] Indian Succession Act, s 232; Act V of 1881, s. 48; Coote's Prob. Pract., 175.
[2] Coote's Prob. Pract., 180.
[3] *Ibid.*, 179.
[4] *Ibid.*, 178.
[5] I. L. R., 4 Calc., 582.
[6] *In the goods of Towgood*, L. R., 2 P. and D., 408.
[7] L. R., 1 P. and D., 664.

after it had issued, as to the true date on which a will was executed, when it was satisfied that the date given in the probate was erroneous.

It may happen that a codicil is discovered after a grant of probate or of letters of administration with the will annexed. In the case of the latter, the codicil may be added to the grant on due proof and identification and the grant altered and amended accordingly.[1] In England, in the case of a codicil being found after probate of the will has been granted, the procedure is different. A separate probate of the codicil is granted, unless it repeals the appointment of the executors made by the will, and the first probate undergoes no alteration or amendment. If, however, the appointment of the executors is annulled or varied by the codicil, the probate must be brought in and a new probate granted of the will and codicil.[2] Where an unattested or unexecuted paper incorporated by the testator in his will has been omitted from probate, the probate may be amended by engrossing the former upon it.[3]

As in England, a grant of probate may be revoked for just cause by the Court which granted it.[4]

"Just cause" according to s. 234 of the Indian Succession Act (corresponding in the s. 50 of the Probate and Administration Act), which follows the English decisions, is explained to be, 1st, that the proceedings to obtain the grant were defective in substance; 2nd, that the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; 3rd, that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; 4th, that the grant has become useless and inoperative through circumstances; 5th,[5] that the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Part XXXIV of the Indian Succession Act, or Chap. II of the Probate and Administration Act, or has exhibited under that Part or Chapter an inventory or account which is untrue in a material respect.[6]

[1] Indian Succession Act, s. 233; Act V of 1881, s. 49.

[2] Indian Succession Act, s. 185; Act V of 1881, s. 10; see Coote's Prob. Pract., pp. 255, 256, citing Dr. Lushington in *Sheldon* v. *Sheldon*, 3 No. Ca, 255, 256.

[3] Coote's Prob. Pract., pp. 255, 256.

[4] Indian Succession Act, s. 234 and Act V of 1881, s. 50, as amended by ss. 2 and 11 of Act VI of 1889.

[5] Added by Act VI of 1889, ss. 2, 11.

[6] The following examples are given by the sections:—(*a.*) The Court by which the grant was made had no jurisdiction. (*b.*) The grant was made without citing parties who ought to have been cited. (*c.*) The will, of which probate was obtained, was forged or revoked.

A grant of probate is not in the nature of a summary proceeding to be contested by a regular suit in the Civil Court.[1] It must be contested in the Court out of which the grant issued, and it must be contested before the Court sitting as a Court of Probate, and not in the exercise of its ordinary civil jurisdiction.[2] It was said by MARKBY, J., in the case of *Komollochun Dutt* v. *Nilrutton Mundle*,[3] "The duty of the Judge upon an application being made under this section (234 of the Indian Succession Act), somewhat depends upon what has passed on the previous grant of probate. Clearly, however, the first thing for him to do is to direct notice to be given to the executor, and all persons interested under the will, or claiming to have any interest in the estate of the deceased. It is also clear from s. 261 (of the Indian Succession Act) that the executor will be the plaintiff in the regular suit which the Judge will then have to try, and the object of this is clear. It is in order to enable the Judge, if he thinks proper, to call upon the executor to prove the will again in the presence of the objector, notwithstanding the prior probate, just as in England he may be called upon to prove the will in solemn form. But a discretion is left to the Judge. Where there has been already full inquiry as to the genuineness of the will, the Judge will probably take, as he would have a right to take, the previous grant of probate as *primâ facie* evidence of the will, and so shift the onus on to the objector. But if there had been no previous contention, and the will had only been proved summarily, or, in what is called common form in England, that is, without any opposition and merely *ex parte*, to the satisfaction of the Judge, who can know nothing of the circumstances or the state of the family, then he ought, in all ordinary cases, to have the will regularly proved afresh so as to give the objector an opportunity of testing the evidence in support of the will, before being called upon to produce his own evidence to impeach it."

The examples[4] in section 234 of the Indian Succession Act are apparently not intended to be exhaustive and the Courts will act upon other circumstances which show that it is expedient or equitable that a grant should be revoked. If a minor obtains probate on the suggestion, or tacit understanding, that he is of full age, or an executor obtains probate of a will of a living person, the pro-

(*d.*) A obtained letters of administration to the estate of B, as his widow, but it has since transpired that she was never married to him. (*e.*) A has taken administration to the estate of B, as if he had died intestate, but a will has since been discovered. (*f.*) Since probate was granted, a later will has been discovered. (*g.*) Since probate was granted, a codicil has been discovered, which revokes or adds to the appointment of executors under the will. (*h.*) The person, to whom probate was, or letters of administration were, granted, has subsequently become of unsound mind.

[1] *Mayho* v. *Williams*, 2 N. W. P. H. C, R., 268.

[2] *Ibid.*, p. 274, *per* TURNER, Offg. C. J.

[3] I. L. R., 4 Calc., 360 ; (S. C.) 4 C. L. R., 175.

[4] See p. 346, note (6).

bate must be revoked.[1] In *In the goods of Morris*,[2] administration granted to the elected guardian of the children of the intestate was recalled, there being a testamentary guardian who had not renounced. *In the goods of Ferrier*,[3] the tenant-for-life having assigned his interest to the remainderman, after taking administration with the will annexed, the grant was revoked and fresh administration granted to the remainderman.

In England, the Court never revokes a grant made to a wrong person except where the person, having the right to the grant which is to take its place, asks for that and is also prepared to take it at the same time that he makes his application to revoke.[4] Thus, in *Phillips* v. *Alcock*,[5] where a husband had obtained administration to the estate of his deceased wife as intestate, and two wills were afterwards produced, the Court refused to revoke the administration, until one of the wills had been proved to be good in law.

The fact of the person to whom a grant of probate or letters of administration has been made becoming of unsound mind is sufficient ground for revoking the probate,[6] but the Indian Acts are silent as to what shall be done in cases where there are more executors than one, and one of them has, after the grant, become insane. In England, in *In the goods of Marshall*,[7] two executors had been appointed by the testator, and one of them applied for and obtained probate of the will, power being reserved for the other to come in. The executor who had obtained probate became of unsound mind and in consequence the estate could not be dealt with. The other executor then obtained probate under the power reserved to him and application was made to have the probate granted to the lunatic revoked. The Court upon such application revoked both probates and granted a fresh probate to the sane executor, reserving a power of making a like grant to the lunatic upon his becoming of sound mind and desiring to obtain the same.[8] There have been cases in England in which the Court has, without revoking the original grant, made subsidiary grants, as where a sole executor has become a lunatic. In such a case a new grant has been made to the Committee of the lunatic, or, where there was no Committee, to the residuary legatee for his use and benefit until he should becomeof sound mind.[9]

[1] *In the goods of Napier*, 1 Phill., 83; see Coote's Prob. Pract., 187; *Trimlestown* v. *Trimlestown*, 3 Hagg., Ec. R., 243.

[2] 2 Sw. and Tr., 360; Coote's Prob. Pract., 29.

[3] 1 Hagg., 241.

[4] Coote's Prob. Pract., 191.

[5] 2 Lee, 97.

[6] Illustration (*h*), s. 234 of the Indian Succession Act.

[7] 1 Curt., 297.

[8] See *In the goods of Newton*, 3 Curt., 428; *In the goods of Phillips*, 2 Add., 335.

[9] Coote's Prob. Pract., 193; see *In the goods of Binckes*, 1 Curt, 286; see also Indian Succession Act, s. 196.

Persons who seek to question a will must prove an interest sufficient to entitle them to a *locus standi* in Court, but the want of interest is an objection which should be taken at the earliest possible stage of the proceeding,[1] and, it seems, a legatee under a will has, so long as the will stands, an interest sufficient to maintain a suit for the revocation of probate.[2] In *In re Bhobosoondari Dabee*,[3] where a judgment-creditor attached certain property belonging to his debtor, who was the next-of-kin of the deceased, the widow of the deceased applied for probate of an alleged will of her husband, and it was held, that the judgment-creditor was entitled to oppose the grant of probate of the will which had the effect of passing property which otherwise would have come to the heir. In the case of *Baijnath Sahai* v. *Desputty Singh*,[4] a Hindu testator died leaving B, alleged to be his adopted son, and C, who would have been his heir in default of adoption, and made a will of which B applied for probate, and it was held, under the Succession Act and Hindu Wills Act, that creditors of C were not parties having any interest in the estate of the deceased, and were therefore not entitled to oppose the grant of the probate, and this decision was approved of by the Privy Council.[5]

In *Komollochun Dutt* v. *Nilrutton Mundle*,[6] K and J, two brothers, originally held possession of certain joint properties in which they each had a half share. On the 1st January, 1872, J died childless, leaving a widow who would, therefore, under Hindu Law succeed to his estate. On the 13th November, 1875, K obtained probate of a will alleged to have been executed by J shortly before his death. Before the grant of probate, namely, in June, 1875, the widow had sold her interest in her husband's estate to the plaintiff, who brought a suit to recover her share in the property upon the strength of his purchase alleging the will, which was at variance with his interest, to be a forgery. The will having been found to be a forgery the District Judge gave the plaintiff a decree. The High Court, however, held that the probate was conclusive, and that an application should have been made to revoke it, and postponed the final decision until the plaintiff had had an opportunity of making such an application.

In the case of *Umanath Mukerjee* v. *Nilmoney Singh Deo*,[7] which followed the case last quoted, it was held by the High Court that a creditor who has, prior to a grant of probate, attached property to which his judgement-debtor would naturally be entitled as heir of the alleged testator, has such an interest

[1] *Mayho* v. *Williams*, 2 N. W. P. H. C. R., 268.
[2] *Ibid.*
[3] I. L. R., 6 Calc., 460; *In re Hurro Lall Shaha*, I. L. R., 8 Cal., 570.
[4] I. L. R., 2 Cal., 208, (S. C.) 25 W. R., 489.
[5] *Nilmoney Singh Deo* v. *Umanath Mookerjee*, I. L. R., 10 Cal., 19, p. 26.
[6] I. L. R., 4 Cal., 360, S. C., 4 C. L. R., 175.
[7] 7 C. L. R., 337, (S. C.) I. L. R., 6 Cal., 429.

in the property of the deceased as to entitle him, on probate of an alleged will being granted, to apply for revocation of the probate for just cause. That case, however, was taken up to the Privy Council and, although the Judicial Committee refrained from coming to any final decision as to the right of an attaching creditor to apply for revocation of a probate, they expressed grave doubt whether he could do so, at least in a case which is not founded on the ground that the probate had been obtained in fraud of creditors.[1] In a subsequent case before the Calcutta High Court, where an attaching creditor entered a caveat on the ground that the will set up by the wife of a deceased judgment-debtor was a forgery and in fraud of creditors, the Court, acting upon the opinion expressed by the Judicial Committee, held that the attaching creditor was entitled to oppose the grant of probate.[2]

The widow of a Hindu testator who has died leaving sons has sufficient interest to apply for the revocation of probate on the ground that the will is not genuine, or to call upon the executor to prove the will in solemn form *per testes*.[3]

Where a person, whose interest is such as would have entitled him to appear in proceedings instituted for obtaining a grant of probate, had notice of such proceedings before the grant of probate was issued, and abstained from coming forward, he will not be allowed to insist that the will be proved in solemn form,[4] unless, perhaps, it were made out that the circumstances leading him to believe the will was not genuine had not come to his knowledge, until after the grant of the probate.[5]

Where an application is made for revocation of probate by a person who alleged that he had no knowledge of the previous proceedings, the Court ought to allow the applicant an opportunity of proving his allegation and if satisfied that he had no such knowledge, should order a new trial as to the factum of the will.[6]

When once probate in solemn form has been granted, no one who has been cited, or has taken part in the proceedings, or who was cognisant of them can afterwards seek to have it cancelled, but possibly a review might be allowed on a proper case being made.[7]

Where probate of the will of a deceased mohunt had been granted to the favourite *chela*, who had been appointed by the testator to be malik of all the

[1] *Nilmoney Singh Deo* v. *Umanath Mukerjee*, I. L. R., 10 Cal., 19.

[2] *Surbomongala Dassi* v. *Shashibhoosun Biswas*, I. L. R., 10 Cal., 413.

[3] *Brinda Chowdhrain* v. *Radhica Chowdhrain*, I. L. R., 11 Cal., 492.

[4] *Ratcliffe* v. *Barnes*, 2 Sw. and Tr., 586; *Newell* v. *Weeks*, 2 Phill., 224; *Re Pitamber Girdhar*, I. L. R., 5 Bom., 638.

[5] *Brinda Chowdhrain* v. *Radhica Chowdhrain*, I. L. R., 11 Cal., 492.

[6] *In re Dintarini Debi*, I. L. R., 8 Cal., 880.

[7] *Re Pitamber Girdhar*, I. L. R., 5 Bom., 638.

properties comprised in the endowment, it being provided by the will that if anything were done prejudicial to the interests of the endowment, or contrary to Hindu practice, religion, or usages, the property should vest in such disciple of his who should be competent and virtuous,—it was held that the Court had no power to revoke the probate on the ground that the *chela* to whom it had been granted had taken to an immoral course of conduct, and in consequence had been excluded from the community of mohunts.[1] It was pointed out that the proper course in such a case would be to bring a suit under the Religious Endowment Act, or any other suit, for a declaration that the person, to whom probate had been granted, had disqualified himself for the office. If in such a suit a decree was obtained and duly certified to the Court which granted probate, that Court, would, it seems, direct the revocation of the probate.[2]

A grant of probate must be contested before the Court out of which it issued sitting as a Court of Probate, and not in the exercise of its ordinary civil jurisdiction. And, the fact that a grant is contested on the ground of the execution of the will having been obtained by fraud will not, it has been held, deprive the District Court, as a Court of Probate, of jurisdiction to determine an application to revoke the probate.[3] In *In re Bhobosoondari Dabee*,[4] WHITE, J., remarked :—"The only grounds upon which probate can be impeached in a Civil Court are those stated in s. 44 of the Evidence Act,—*viz.*, that the probate was granted by a Court not competent to grant it, or that it was obtained by fraud of collusion, which means fraud or collusion upon the Court, and perhaps also fraud upon the person disinherited by the will;[5] but it cannot be shown that the will was never executed by the testator, or was procured by a fraud practised upon him."[6]

Under the Indian Succession Act and the Probate and Administration Act, the jurisdiction in granting and revoking probates is conferred on the District Judge in all cases within his district,[7] but the High Court has concurrent jurisdiction with him in the exercise of all powers conferred upon him on that behalf,[8] and every order made by him in virtue of such powers is appealable to

[1] *Mohun Dass* v. *Lutchmun Dass*, I. L. R., 6 Cal., 11; (S. C.) 6 C. L. R., 265.

[2] Intestate and Testamentary Succession in India, p. 249.

[3] *Mayho* v. *Williams*, 2 N. W. P. H. C. R., 298; *Priestman* v. *Thomas*, L. R., 9 Prob., 70, 210.

[4] I. L. R., 6 Calc., 460.

[5] *Barnesly* v. *Powel*, 1 Ves. Sen., 119, 284.

[6] Intestate and Testamentary Succession in India, p. 251.

[7] Indian Succession Act, s. 235; Act V of 1881, s. 51.

[8] *Ibid.*, s. 264; Act V of 1881, s. 87; see *In the goods of Monohur Mookerjee*, I. L. R., 5 Cal.,

the High Court under the rules contained in the Civil Procedure Code applicable to appeals.[1] By s. 235A of the Indian Succession Act,[2] and s. 52 of the Probate and Administration Act, the High Court has power to appoint such Judicial officers, within any district as it thinks fit, to act for the District Judge as delegates to grant probate and letters of administration in non-contentious cases, but, in cases of High Courts not established by Royal Charter, the appointment must be made with the previous sanction of the Local Government. The District Court has no jurisdiction except in cases within the Indian Succession Act or Probate and Administration Act.[3] Under the latter Act, it has now jurisdiction to admit the will of a Mahomedan to probate.[4]

In Assam, the jurisdiction in granting probates and letters of administration is vested, not in the Deputy Commissioner, but in the Judicial Commissioner.[5]

The powers and authority of the District Judge in regard to proceedings relating to granting of probate and letters of administration are the same as those vested in him in relation to any civil suit or proceeding pending in his Court,[6] and his proceedings are generally to be regulated, as far as the circumstances of the case will admit, by the Code of Civil Procedure.[7] It has been suggested by Mr. Stokes in his Commentary on the Indian Succession Act that s. 238 applies to proceedings of High Courts in their testamentary and intestate jurisdiction, and that their proceedings also must be regulated by the Code of Civil Procedure in matters relating to the granting of probate and letters of administration. By the rules, however, of the High Court, Calcutta, it was provided, that the procedure in all cases, which should be brought before the Court in the exercise of its original testamentary and intestate jurisdiction, should be regulated, as far as the circumstances of the case admit, by the rules of procedure laid down in the Indian Succession Act of 1865, whether the Act itself applies to the case or not; and in cases in which such rules are inapplicable, the procedure should be regulated by the Code of Civil Procedure.[8]

756, (S. C.), 6 C. L. R., 228, where as a Court of concurrent jurisdiction, the High Court dealt with a case which had been improperly referred to it, under s. 617 of the Civil Procedure Code, by a District Judge.

[1] Indian Succession Act, s. 263, Act V of 1881; s. 86; see *Brojonath Pal* v. *Dusmoney Dassee*, 2 C. L. R., 589.

[2] This section has been inserted in the Act by s. 2 of Act VI of 1881, the District Delegates Act.

[3] See Act XXV of 1838.

[4] See *Fatimunnissa Begum* v. *Mir Hamza Ali*, 6 C. L. R., 391.

[5] *Thakoor Kristo Surma* v. *Basoodeb Ghoshamee*, 12 W. R., 424.

[6] Indian Succession Act, s. 236; Act V of 1881, s. 53.

[7] *Ibid.*, s. 238; Act V of 1881, s. 55.

[8] Rule 65, Belchambers's Rules and Orders, p. 89. Intestate and Testamentary Succession in India, p. 254.

Under s. 237 of the Indian Succession Act and s. 54 of the Probate and Administration Act, the District Judge has power to order the production in Court of testamentary papers or to take steps to cause their production in Court.

The fact that the testator, at the time of his death, had a fixed place of abode, or any property moveable or immoveable, within the jurisdiction of the Judge is sufficient to give him jurisdiction to grant probate to any one applying therefor upon a petition stating these facts,[1] and it has been held to be sufficient for the purpose of giving jurisdiction under this section that the property alleged by the petition to have been situate within the jurisdiction of the Judge, should have been in the possession of the testator at the time of his death.[2] In non-contentious cases a District Delegate may grant probate where it appears on a verified petition that the testator resided at the time of his death within his jurisdiction.[3]

Where the deceased had no fixed abode at the time of his death within the district, and application is made for probate, the Judge may refuse the application if he consider that the application could be disposed more justly or conveniently in another district.[4]

Section 244 of the Indian Succession Act, as amended by s. 4 of Act VI of 1881, and s. 62 of the Probate and Administration Act give directions as to the form in which applications for probate must be made :—In cases where the will is written in any language other than English, or that in ordinary use in proceedings before the Court, a translation of the will by a translator of the Court, if the language be one for which a translator is appointed, or, if the will be in any other language, by a person competent to translate the same, must be annexed to the petition for probate.[5]

If an application for probate be properly made and verified it will be conclusive for the purpose of authorizing the grant of probate, and no grant made upon such application can be impeached by reason of the fact that the testator had no fixed abode or no property within the district at the time of his death, unless by a proceeding to revoke the grant, if obtained by fraud upon the Court.[6]

It may be here mentioned that the Limitation Act does not apply to applica-

[1] Indian Succession Act, s. 240; Act V of 1881, s. 56; see *In the matter of Hurro Lall Shoha*, I. L. R., 8 Cal., 570.

[2] *Run Bahadur Singh* v. *Moharanee Rajrup Koer*, 4 C. L. R., 498.

[3] S. 241 A of the Indian Succession Act, inserted by s. 3 of the District Delegates Act; Act V of 1881, s. 58.

[4] Indian Succession Act, s. 241; Act V of 1881, s. 57.

[5] Indian Succession Act, s. 245; Act V of 1881, s. 63; see Rule 679, Belchambers's Rules and Orders, pp. 269-70.

[6] Indian Succession Act, s. 243; Act V of 1881, s. 61.

tions for probate.[1] Probate, however, cannot be granted until the expiration of 7 clear days from the testator's death.[2] But letters of administration with the will annexed may be granted within that time.[3]

In cases to which the Indian Succession Act applies, the District Judge in whose jurisdiction any property of a deceased person is situate, is authorized and required under s. 239,[4] until probate is granted of the will of the deceased person, or an administrator of his estate granted, to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he shall see fit, he may appoint an officer to take and keep possession of the property. The person so appointed, however, is not a legal representative, and cannot institute or defend a suit.[5]

Probate, as we have seen, establishes the will from the death of the testator.[6] By section 242 of the Indian Succession Act, it is provided that probate or letters of administration shall have effect over all the property and estate, moveable or immoveable, of the deceased, throughout the province in which the same is granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted, provided that probate and letters of administration granted by a High Court,[7] after the first day of April, 1875, shall, unless otherwise directed by the grant, have like effect throughout the whole of British India.[8]

[1] *In re Ishan Chunder Roy*, I. L. R., 6 Calc., 707; (S. C.) 8 C. L. R., 52; *Gobind Chund Gossami* v. *Rungun Money Dassee*, 6 C. L. R., 345, (S. C.); I. L. R., 6 Calc., 60.

[2] Indian Succession Act, s. 258; Act V of 1881, s. 80.

[3] *In the goods of Wilson*, I. L. R., 1 Cal., 149.

[4] That section is not incorporated in Act V of 1881.

[5] See Act II of 1874, s. 64. See Regimental Debts Act, 26 and 27 Vict., c. 57, ss. 7 and 8.

[6] P. 324, *supra*.

[7] The expression 'High Court' means —"(*a*) a High Court for the time being established under 24 and 25 Vict, c. 104; (*b*) the Chief Court of the Punjab; (*c*) the Court of the Recorder, Rangoon."—Act II of 1877, s. 1; Act XIII of 1875.

[8] The proviso was added by Act XIII of 1875, s. 2. The section, as amended by Act XIII of 1875 and Act II of 1877, has been incorporated, with slight additions in the proviso, as s. 58, in the Probate and Administration Act, V of 1881. The proviso in that Act is as follows:—Provided that probates and letters of administration granted by a High Court established by Royal Charter, or by the Chief Court of the Punjab, or by the Court of the Recorder of Rangoon, shall, unless otherwise directed by the grant, have like effect throughout the whole of British India.

In the case of persons not governed by the Indian Succession Act or by the Probate and Administration Act, probates, it was held by the Bombay High Court, granted in respect of Hindus, Mahomedans and other persons not usually designated as British subjects take effect only, and can only be granted, for the purpose of recovering debts and securing debtors paying the same, except so far as was provided by Act XXVII of 1860.[1] Cutch Memons,[2] it was held in 1880, were not Hindus, within the meaning of s. 2 of the Hindu Wills Act, and in their case, therefore, probate could not be granted to take effect throughout India.[3] In cases under s. 179 of the Indian Succession Act, or s. 4 of the Probate and Administration Act, probate limited to part of the estate cannot be granted.[4]

The wills of Cutch Memons are now apparently governed, as to probate, by the Probate and Administration Act in territories where that Act is made applicable.

Grants of letters of administration to an Administrator-General, under Act II of 1874, it was held, were not affected by the amending Act, XIII of 1875, and, accordingly, such grants, though general in form, were still limited to the Administrator-General's own Presidency.[5] But now, under s. 3 of the Administrator General's Act, IX of 1881, the High Court may direct, by its grant, that probate or letters of administration granted to an Administrator-General of one Presidency shall have effect throughout either or both of the other Presidencies.

In *the goods of Shama Churn Mullick*,[6] where the testator died in 1872, leaving a will dated 20th November, 1865, and left property within the local jurisdiction of the High Court at Calcutta and also within the local jurisdiction of the High Court at Bombay, probate was granted to the executors as to the property situate in Calcutta. An application was subsequently made by the executors for a grant of probate limited to the property in Bombay, and a certificate under s. 3 of Act XIII of 1875[7] was asked for. The Court held, that it was not empowered under Act XIII of 1875, to grant probate limited to property in any province or presidency. Again, in a reference under the Court Fees Act, it was held that, except under special circumstances, letters of administration to the estate of a deceased Hindu must be taken out in respect

[1] See now Act VII of 1889.

[2] See *Rahmabhai* v. *Haji Jussup*, Perry's Oriental Cases, p. 110.

[3] *In re Haji Ismail, Haji Abdula*, I. L. R., 6 Bom., 452.

[4] See *supra*, pp. 325, 343; *In re Thaker Madhavji Dharamsi*, I. L. R., 6 Bom., 460.

[5] *In the goods of Hewson*, I. L. R., 4 Calc., 770; (S. C.) 4 C. L. R., 42. See s. 66 of Act II of 1874.

[6] I. L. R, 1 Calc., 52.

[7] S. 242 A of the Indian Succession Act.

of the immoveable, as well as the moveable, property forming part of the estate, and duty paid on the value of the whole.[1] But, in the High Court at Calcutta, under the Rules of the Court after the first day of April, 1875, all grants of probate or letters of administration under the Succession Act of 1865, and all grants of probate or letters of administration with the will annexed under the Hindu Wills Act, 1870, must unless otherwise ordered, be drawn up by the Registrar with effect limited to the province of Bengal.[2]

Whenever a High Court grants probate with effect throughout the whole of British India, it must by a certificate notify the fact to the other High Courts[3] and similar provision is made by the Probate and Administration Act for the transmission of a certificate whenever any Court under that Act grants unlimited probate.[4] In the case of an unlimited grant by the High Court at Fort William, the Registrar of the Court must send with the certificate an inventory of the property and effects of the deceased.[5] Under the rules in force in the High Court, Calcutta, every petition for probate or letters of administration must contain, in addition to the particulars required by the Indian Succession Act, a statement containing such details as will show fully how and on what principle the value is calculated or arrived at.[6] Every petition for probate must be signed by the petitioner of his pleader, if any, and verified by the petitioner himself,[7] and by one of the witnesses when procurable,[8] and a person knowingly making a false verification is liable to punishment for giving or fabricating false evidence.[9]

Upon an application for probate, so long as it is made *bonâ fide*, it is not the province of the Court to go into questions of title with reference to the property of which the will purports to dispose.[10] On the other hand, a grant of probate

[1] *In the goods of Grish Chunder Mitter*, I. L. R., 6 Calc., 483; (S. C.) 7 C. L. R., 593. In the reports of this case the eariler cases on this subject will be found collected.

[2] Belchambers's Rules and Orders, No. 701, p. 280, dated the 21st June 1875. As to probates and letters of administration granted in respect of estates of Hindus, see the Probate and Administration Act, V of 1881, s. 59. Intestate and Testamentary Succession in India p. 256.

[3] For the form of the certificate, see s. 242 A of the Indian Succession Act.

[4] Act V of 1881, s. 60.

[5] Belchambers's Rules and Orders, No. 705, p. 282

[6] Belchambers's Rules and Orders, No. 700, dated the 1st March, 1873, p. 280; see Rule 671, *Ibid.*, p. 369.

[7] Indian Succession Act, s. 247; Act V of 1881, s. 66.

[8] *Ibid.*, s. 248; Act V of 1881, s. 67.

[9] *Ibid*, s. 249; Act V of 1881, s. 68; see Indian Penal Code, Act XLV of 1860, Chap XI.

[10] *Behary Lall Sandyal* v. *Juggo Mohun Gossain*, I. L. R., 4 Calc., 1; (S. C.) 2 C. L R., 422; see *Jogesh Chunder Chukravarti* v. *Umatara Debya*, 2 C. L R., 577; *Nanhu Koer* v. *Somirun Thakur*, 8 C. L. R., 287.

as pointed out, in the case of *Behary Lall Sandyal* v. *Juggo Mohun Gossain*, by GARTH, C. J., does not confer upon the executor any title to property which his testator had no right to dispose of. It only perfects the representative title of the executor to the property which did belong to the testator and over which he had a disposing power.[1]

If an application for probate is unopposed, proof of the execution of the will is sufficient to warrant a grant of probate, it being of importance that the testator's estate should be represented as speedily as possible, and the grant not being irrevocable.[2] In all cases, however, where an application is made for probate, the District Judge or District Delegate may, if he think proper, examine the petitioner in person, upon oath or solemn affirmation, and also require further evidence of the due execution of the will, and issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come in and see the proceedings before the grant of probate.[3] Any person who would be entitled to apply for the revocation of probate would also be entitled upon a general citation to come in and oppose the grant of probate.[4]

In the case of *Byjnath Shahai* v. *Desputty Singh*,[5] where the alleged adopted son of the testator applied for probate of the will, the creditors of the person who would have been the heir in default of adoption came in and opposed the grant of probate; but the Court (KEMP and BIRCH, JJ.) held, that they were not parties having any interest in the estate of the deceased, and were therefore not entitled to oppose the grant of probate. In the case, however, of *Komullochun Dutt*, v. *Nilrutton Mundle*,[6] MARKBY, J., in giving the judgment of the Court, said: "If we thought that the decision in *Byjnath Shahai* v. *Desputty Singh* went as far as to hold that a purchaser or an attaching creditor could not apply for revocation of a probate, we should, as at present advised, refer the point to be settled to a Full Bench, because we should disagree from such a ruling." In *Komullochun Dutt* v. *Nilrutton Mundle*, the Court was of opinion that a person interested by assignment in the estate of the deceased may, where a will has been set up and proved at variance to his interests, apply for the revocation of the probate of the will so set up.[7]

[1] See *In re Nobodoorga*, 7 C. L. R., 387.

[2] *In re Nobodoorga*, 7 C. L. R., 387; see *In re Shustee Churn Patuck*, 23 W. R., 103; *Obhoy Churn Mustafi* v. *Uma Churn Mustafi*, 1 C. L. R., 362; *Ravji Ranchod* v. *Vishnu Ranchod*, I. L. R., 9 Bom., 241.

[3] Indian Succession Act, s. 250, as amended by s. 9 of Act VI of 1881; Act V of 1881, s. 69.

[4] See p. 349.

[5] I. L. R., 2 Calc., 208; (S. C.) 25 W. R., 489.

[6] 4 C. L. R., 175; (S. C.) I. L. R., 4 Calc., 360.

[7] Intestate and Testamentary Succession in India, p. 263.

In another case, FIELD, J., expressed an opinion that any person who can show that he is entitled to maintain a suit in respect of property over which probate would have effect, possesses a sufficient interest to entitle him to enter a *caveat* and oppose a grant of probate.[1] Thus, the mortgagee, under a mortgage executed by the next-of-kin of the deceased after his death, of property which was alleged by the widow, who propounded a will, to have formed part of her husband's estate, is entitled to oppose the grant of probate.[2]

In the case of *Uma Nath Mookerjee* v. *Nilmoni Singh Deo Bahadur*,[3] MORRIS and PRINSEP, JJ., held, that a creditor, who had, prior to the grant of probate, attached property to which his judgment-debtor would naturally be entitled as heir of the alleged testator, had such an interest in the property of the deceased as to entitle him to apply for revocation of the probate for just cause,[4] under s. 234 of the Indian Succession Act. The last mentioned case was appealed to the Privy Council, and the Judicial Committee, without deciding the point as to whether an attaching creditor had sufficient interest to apply for revocation of probate, expressed grave doubts whether he could do so, unless upon the ground that the probate had been obtained in fraud of creditors.[5] In a still later case,[6] the High Court at Calcutta allowed an attaching creditor, who had entered a *caveat*, to oppose the grant of probate on the ground that the will which was set up by the wife of the testator was a forgery and a fraud upon the testator's creditors.

Caveats may be lodged with the District Judge or District Delegate[7] and no proceedings can be taken upon a petition for probate without due notice to the caveator.[8] In contentious cases, that is, cases where any person appears in person, or by recognised agent or pleader duly appointed to act in his behalf, to oppose the proceedings, and, in cases in which it otherwise appears that probate should not be granted by his Court, the District Delegate cannot grant pro-

[1] In *Bhobosoondari Dabee*, I. L. R., 6 Calc., 460.

[2] *Ibid.*

[3] 7 C. L. R., 337, (S. C.) I. L. R., 6 Calc., 429.

[4] Intestate and Testamentary Succession in India, p. 263.

[5] *Nilmoni Singh Deo* v. *Umanath Mookerjee*, I. L. R., 10 Cal., 19.

[6] *Surbomongala Dassi* v. *Shashi Bhooshun Biswas*, I. L. R., 10 Cal., 413.

[7] Indian Succession Act, s. 251, as amended by Act VI of 1881, s. 5; Act V of 1881, s. 70, For form of *caveat* see s. 252 of Act X of 1865, and s. 71 of Act V of 1881.

[8] Indian Succession Act, s. 253, as amended by s. 6 of Act VI of 1881; Act V of 1881 s. 72. Under the rules of the High Court at Calcutta, a caveat must be supported by affidavit within eight days stating the right and interest of the caveator and the grounds of objection to the application. Unless such affidavit be so filed, the caveat will not prevent the granting of probate or letters of administration; and no affidavit can be filed after the expiration of eight days, without the special leave of the Court or a Judge thereof.—Belchambers's Rules and Orders, p. 275, rule 688.

bate.[1] In doubtful cases where there is no contention, the District Delegate may refer the matter to the District Judge and be guided by his instructions.[2]

In cases where contention is raised before the District Delegate, or he considers that probate should not be granted by his Court, the petition and other papers must be returned to the applicant, unless he considers it necessary for the purposes of justice to impound the same, in which case he shall do so and transmit them to the District Judge.[3]

The forms of a grant of probate and of a grant of letters of administration with the will annexed will be found in ss. 254 and 255 of the Indian Succession Act and in the corresponding sections (76 and 77) of the Probate and Administration Act.[4]

Section 256 of the Indian Succession provided for the taking of an administration bond from "*every person to whom any grant of administration shall be committed*,[5] and upon that section, taken in connection with the definition of probate in s. 3 of the same Act, the High Court at Calcutta, in the case of *In the matter of Juggodishari Dabi*, held that executors as well as administrators were liable to give security.[6] This was contrary to the practice in England, and it appears also that it had been the uniform practice previously in the High Court, Calcutta, to grant probate without taking a bond from the executors. Moreover, in the case of *Run Bahadur Singh* v. *Moharanee Rajrup Koer*,[7] where it was asked that the grant of probate should be conditional upon the executor furnishing security, the Court (AINSLIE and BROUGHTON, JJ.) had refused to depart from that practice. The Madras High Court had also considered that a bond could not be taken from a person to whom probate was granted.[8]

Notwithstanding the decision in the case of *In the matter of Juggodishari Debi*, it does not seem to have been the intention of the Legislature to depart from the rule of English law in framing the section; for, in the Statement of Objects and Reasons to the Probate and Administration Act, V of 1881, the Legal Member of Council says: "The Indian Succession Act, following the English law, provides for the taking of security for the due discharge of his office only from an administrator, it being considered that, in the case of an executor,

[1] Indian Succession Act, s. 253 A, inserted by Act VI of 1881 s. 7; Act V of 1881, s. 73.

[2] Indian Succession Act, 253 B, inserted by Act VI of 1881, s. 7; Act V of 1881, s. 74.

[3] *Ibid.*, s. 253 C, inserted by Act VI of 1881, s. 7; Act V of 1881, s. 75.

[4] These sections have been slightly altered by Act VI of 1889, ss. 4, 5, and 12, 13.

[5] For these words in italics the following have now been substituted: "Every person to whom any grant *of letters* of administration shall be committed."—Act VI of 1889, s. 6.

[6] I. L. R., 7 Cal., 84 (S. C.) 8 C. L. R., 397.

[7] 4 C. L. R., 498.

[8] Proceedings, December 22nd, 1866, 3 Mad. H. C. R., App. x.

who is selected by the testator himself, such security can safely be dispensed with."

In the Probate and Administration Act,[1] however, it was thought necessary to give the Court discretion to take security even from an executor, on the ground, it seems, that, amongst the classes to which that Act applies, cases, it was apprehended, might occasionally occur in which it might be expedient that security should be given.[2] Now, under the Indian Succession Act, as amended by s. 6 of Act VI of 1889, it is no longer necessary for an executor to furnish security.

The proceedings in contentious cases before the District Judge must, as nearly as may be, take the form of a regular suit, the petitioner for probate being plaintiff, and the person opposing being defendant.[3] Where the will is contested, the Court is bound to consider not only whether the alleged will was executed by the testator, but whether the will is valid or invalid, and whether probate of the will ought to be granted. Every consideration, in fact, which ought to induce the Court to refuse probate of the will must be taken into account.[4]

Where probate has been wrongly granted, the proper course is to apply to the Court by which it was granted to revoke the probate, for a grant of probate can only be contested by a suit in Court (sitting as a Court of probate and not as a Civil Court) out of which the grant issued,[5] and the persons who seek to contest a will must prove an interest to entitle them to a *locus standi* in the Court.[6]

Until a grant of probate has been revoked or recalled, no person other than the grantee has power to sue or prosecute any suit, or otherwise act as representative of the deceased throughout the Province is which the grant was made,[7] and

[1] Every person to whom any grant of letters of administration is committed, and, if the Judge so direct, any person to whom probate is granted, shall give a bond to the Judge of the District Court to enure for the benefit of the Judge for the time being with one or more surety or sureties, engaging for the due collection, getting in and administering the estate of the deceased, which bond shall be in such form, as the Judge from time to time by any general or special order directs.

[2] Act V of 1881 s. 78. Intestate and Testamentary Succession in India, p. 268.

[3] Indian Succession Act, s. 261; Act V of 1881, s. 83; see *Ravji Ranchod* v. *Vishnu Ranchod*, I. L. R., 9 Bom., 241.

[4] *Annoda Sundari Dabi* v. *Jugutmoni Dabi*, 6 C. L. R., 176; see *Saroda Soonduree Dossia* v. *Muddun Mohun Shaha*, 24 W. R., 162.

[5] *Mayha* v. *Williams*, 2 All. H. C. R., 268; *Komullochun Dutt* v. *Nilrutton Mundle*, I. L. R., 4 Cal., 360, (S. C.) 4 C. L. R., 175, *per* MARKBY, J.

[6] *Vide supra*, p 349.

[7] Indian Succession Act, s. 260; Act V of 1881, s. 12; see Stat., 20 and 21 Vict., c. 77, s. 75.

where probate is revoked, the executor and others who have acted on the faith of the probate are protected, *bonâ fide* payments to the executor under the probate being a legal discharge to the persons making the payments and the executor himself being entitled to recoup himself all payments lawfully made by him.[1]

Under s. 333 of the Indian Succession Act and s. 157 of the Probate and Administration Act, which sections have been added to these Acts respectively by ss. 10 and 17 of Act VI of 1889, "when a grant of probate or letters of administration is revoked or annulled under this Act, the person to whom the grant was made must forthwith deliver up the probate or letters to the Court which made the grant. If such person wilfully and without sufficient cause omits so to deliver up the probate or letters, he shall be punished with fine which may extend to one thousand rupees, or with imprisonment which may extend to three months, or with both."

Section 259 of the Indian Succession Act and s. 81 of the Probate and Administration Act make provision for the filing and preservation by District Judges and District Delegates of all wills of which probate or letters of administration with the will annexed have been granted, and for the appointment by the Local Government of a public registry of wills.[2]

As to costs in contentious cases reference may be made to Mr. Coote's, Probate Practice, pp. 263-266.

Where the difficulty had been created by the testator himself, the costs of probate and litigation of both parties may be ordered to come out of the estate.[3]

[1] Indian Succession Act, s. 262; Act V of 1881, s. 84.

[2] In Registration Act, III of 1877, ss. 42-46 as to depositing wills in Registration offices.

[3] *Charter* v. *Charter*, L. R., 7 H. of L., 364; in lower Court, L. R., 8 Ch. D., 218.

LECTURE XI.

POWERS, DUTIES AND LIABILITIES OF EXECUTORS.

Executors of their own wrong—Powers of Executors generally—Powers of Mahomedan Executors—Duties of Executors—Distribution of the testator's estate, and Abatement of legacies—Executor's assent to legacies—Refunding of Legacies—Investment of Funds to provide for Legacies—Liability of Executors—*Devastavit.*

Ordinarily an executor is the person to whom the execution of his will is confided by the testator's appointment.[1] There is, however, another class of executors who are not appointed to the office, but who are treated as such in consequence of their having interfered with the estate of the deceased. Such a person is called executor of his own wrong, or executor *de son tort.*

The circumstances which will constitute a person an executor *de son tort* are the same in India as in England. It is, however, to be borne in mind that the provisions of the Indian Succession Act relating to executors *de son tort* were not made applicable to Hindus and other persons to whom the Hindu Wills Act applies, nor have they been in any way incorporated in the more recent Act, the Probate and Administration Act.

From the case of *Jogendranarain Deb Roykut* v. *Emily Temple*,[2] it would appear to be doubtful whether the principles applied in England against a person who intermeddles with the estate of a deceased are applicable at all in the case of Hindus. In that case PHEAR, J. said:—"According then to the state of the law affecting Hindus, as I understand it, if a debtor dies leaving his debt unsatisfied, the creditor must look for payment to the person who has received the deceased's property in due course of descent, or in Bengal, if the deceased man has left a will, to the executor who has taken assets, or to an administrator who has taken out administration. Now by what outward signs is the creditor to recognize the person who bears any one of these three characters. Obviously there is but one available due to him, *viz.*, the factum of his dealing with the assets of the deceased. And I am of opinion that here, as in England, the creditor is not obliged to seek out the root of any one's authority whom he finds in possession of the property which the deceased man left at his death. He may sue such a person on the foundation of that possession only, and in the event of his doing so, it will be on the defendant to show not only

[1] See Indian Succession Act, s. 2.

[2] 2 Ind. Jur., N. S., 234; see *Roghoonath Ghose* v. *Buddinath Mitter*, Morton's Rep., by Montriou, 308; *Mohar Essada Bye Sahib Pushwah* v. *E. I. Co.*, 1 Tay. and B., 290.

that he did not in fact become possessed of the property in either one of the characters of heir, executor or administrator, but also to establish that he has a good title to hold it by some other right. If he is unable to do this, the Court will hold him liable, as of his own wrong, to discharge the plaintiff's claim in the same way, and to the same extent, as if he were actually clothed with one of the three characters which I have specified. I conceive this to be matter of evidence only, depending upon those principles alone which have led in England to the recognition of the vicarial liability hidden under the name of executor *de son tort*. It is suggested that the doctrine, which I have just attempted to put into words, has never yet received judicial sanction in this country, and the case of *Mohar Essada Bye Sahib Pushwah* v. *East India Company*,[1] has been quoted to make out that it has even been condemned. It appears to me, however, that this argument is founded upon a wrong construction of the judgment which the Court passed in that case. The plaintiff, as administratrix, sued the defendants for an account of their dealings with the estate of the deceased during the period between the date of the death, and the date of her own letters of administration, on the ground that they had acted as executors *de leur tort* throughout some portion of that interval. The Court after expressing some doubt as to the exact nature of the authority or interest conferred by letters of administration in regard to the property of a deceased Hindu, merely held that they certainly do not entitle the administrator to seek an account of dealings effected antecedently to his own grant of administration; because, if for no other reason, there must have been complete representation of the deceased and his estate from the moment of death in the shape of an heir (or next-of-kin) to whom the account should be made by the intermeddler, if any account were due. I do not understand the Court even to have hinted that defendants might not have been successfully treated as executors of their own wrong by a creditor suing to recover on a debt due to him from the deceased. And in *Roghoonath Ghose* v. *Buddinath Mitter*,[2] where a bill of discovery filed against persons dealing with an estate as executors *de son tort* was demurred to, on the double ground that it did not show fact of intermeddling, and also that under Hindoo Law there could be no executor *de son tort*, while the demurrer was allowed, leave was given to amend, and thus, apparently, for no reasons are given, the objection of law was overruled. On the other hand, it is, I believe, matter of daily practice in the Civil Courts throughout the country to make an heir with assets answer for the debts of the deceased upon the slightest possible evidence of kinship, if not upon absolutely none. It does not appear to me therefore, that the opinion which I have already expressed is in any degree novel."

[1] 1 Tay. and B, 290.

[2] Morton's Rep. by Montriou, p. 308.

That case was taken on appeal before PEACOCK, C. J., and MACPHERSON, J., but these learned Judges, in affirming the judgment of the Court below, did not find it necessary to decide whether a Hindu could be made executor *de son tort*.

An executor *de son tort*, according to the Indian Succession Act, is one who intermeddles with the estate of the deceased, or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence; but intermeddling with the goods of the deceased for the purpose of preserving them, or providing for the funeral, or for the immediate necessities of the family or property of the deceased, or dealing in the ordinary course of business with goods of the deceased received from another will not make a person an executor *de son tort*.[1] It seems, however, that a very slight circumstance of intermedding with the goods of the testator will make a person executor *de son tort*. Thus, if a man sells any of the goods, or if he takes the goods to satisfy his own debt or legacy, or demands the debts of the deceased, or makes acquittances for them, or receives them, he will become an executor *de son tort*.[2] So, if he pays the debts of the deceased with the money of the deceased or carries on the business of the deceased, or if, he sue as executor,[3] or if in an action brought against him as executor, he pleads in that character, this will make him an executor *de son tort*.[4]

If a person appointed an agent by the deceased in his lifetime to collect debts and sell his goods continues to do so after he hears of the death of the deceased, he will be treated as an executor of his own wrong in respect of all acts done by him after he became aware of the death.[5]

If an executor *de son tort* hands over part of the property, of which he has wrongfully possessed himself, to a second person, that person may possibly be sued in equity; but he is not liable as executor *de son tort*.[6] Thus, in the case of *Paull* v. *Simpson*,[7] where a lessee died intestate during the term, and his widow entered without taking out administration and paid the rent, and afterwards her son-in-law took the premises with her concurrence and with the assent of the landlord, and paid rent and continued to occupy during the remainder of the term, it was held, that although the widow might have been chargeable as executrix *de son tort*, her son-in-law had not made himself executor *de son tort* by taking the premises from her.[8]

[1] Indian Succession Act, s. 265; Williams on Executors, pp. 265-266.

[2] Williams on Executors, 260-263.

[3] Indian Succession Act, s. 265, illustration (c).

[4] Williams on Executors, 263.

[5] Indian Succession Act, s. 265, illustration (b).

[6] *Hill* v. *Curtis*, L. R., 1 Eq., 90; *Paull* v. *Simpson*, 9 Q. B., 365.

[7] 9 Q. B., 365.

[8] Williams on Executors, 267.

In *Williams* v. *Heales*,[1] it appeared that, in 1810, a lease for 61¼ years was granted by the predecessor in title of the plaintiff to one "H. G., his executors, administrators, and assigns." In 1814 H. G. died intestate. His widow administered to his estate and remained possessed of the estate till her death in 1843. After her death, G. S. H., the father of the defendant, who had married a daughter of H. G., without any administration, took possession and received the rent, paying the ground-rent, and he continued to do so till his death in 1856. After the death of G. S. H., the defendant received, and continued to receive the rent, paying the ground-rent and dividing the balance between the two sisters and himself—no further administration having been taken out. He continued to do this down to the expiration of the lease, when he delivered up the premises to the plaintiffs out of repair. The Court was of opinion, that the defendant had done more than the defendant in *Paull* v. *Simpson*, and was executor *de son tort* of the term.

If a man, however, take the goods of the deceased by mistake supposing them to be his own, he will not be executor *de son tort*;[2] nor if he take them as agent for the rightful executor.[3]

If there be a rightful administrator or executor, a person who gets possession of property belonging to the estate of the deceased or otherwise interferes with the estate is a trespasser and not an executor *de son tort*.[4] Were the mere possession of assets to constitute a man executor *de son tort*, there might, as pointed out by SIR J. PLUMER, M. R., be at one and the same time both a rightful executor and an executor *de son tort*, the former deriving his title from the will which he had proved, the other clothed with his character by virtue of his having part of the assets on his hands, and if portions of the effects could be traced into the hands of twenty or more persons, each of them might on that principle be an executor *de son tort*.[5]

If a person sets up in himself a colorable title to the possession of the goods of the deceased, though he may not be able to establish a completely strict and legal title, it will be sufficient to exempt him from being charged as an executor *de son tort*.[6]

An executor *de son tort*, it was said by LORD COTTENHAM, has all the liabilities but none of the privileges that belong to the character of executor.[7] He

[1] L. R., 9 C. P., 177.

[2] Williams on Executors, 268.

[3] *Ibid.* See *Sykes* v. *Sykes*, L. R., 5 C. P., 113. Intestate and Testamentary Succession in India, p. 274.

[4] Anonymous, 1 Salk., 312, *Tomlin* v. *Beck*, 1 Turn. and R., 438.

[5] *Tomlin* v. *Beck*, 1 Turn. and Russ., 438.

[6] *Fennings* v. *Jarrat*, 1 Esp. N. P., 335.

[7] *Carmichael* v. *Carmichael*, 2 Phill., C. C., p. 103.

is answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his hands, after deducting payments made to the rightful executor or administrators, and payments made in a due course of administration.[1] He is not liable for a general account, but only to the extent of assets he has received, and he may be sued to the extent of such assets, although there be no legal representative.[2] He may discharge himself in a suit for account by proving that he has handed over the assets to the rightful representative.[3] But the agent of an executor *de son tort* does not discharge himself by accounting, in respect of his dealings as agent with the deceased's estate, to his principal; for the law does not recognise the relation of principal and agent among wrongdoers.[4] In *Sharland* v. *Meldon*,[5] A, who was employed by the widow of the testator to collect the debts due to the estate, collected the debts and paid the money over to the widow, believing she was the administratrix. The widow died without having obtained letters of administration, and it was held, that A having received monies which he knew to be part of the estate of the testator, and not having accounted to the legal representative of the testator, was liable as as executor *de son tort*.

An executor *de son tort* cannot, in England, specially plead a retainer for his own debt, for otherwise the creditors of the deceased would be running a race to take possession of his goods without taking administration to him.[6] Under the Indian Succession Act, s. 282, and also under the Probate and Administration Act,[7] no executor has a right of retainer for his own debt in preference to other debts.

In the case of *Buckley* v. *Barber*,[8] PARKE, B., said, that the act of an executor *de son tort* is good against the true representative only where it is lawful, and is such an act as the true representative was bound to perform in due course of administration.[9]

We have seen[10] that the whole of the property of a deceased testator vests

[1] Indian Succession Act, s. 266.

[2] *Coote* v. *Whittington*, L. R., 16 Eq. 534, following *Rayner* v. *Kochler*, L. R., 14 Eq. 262, and dissenting from *Cary* v. *Hills*, 15 Eq., 79.

[3] *Hill* v. *Carter*, L. R., 1 Eq., 90.

[4] *Sharland* v. *Mildon*, 5 Hare, 469.

[5] 5 Hare, 469.

[6] Williams on Executors, 273.

[7] Act V of 1881, s. 104.

[8] 6 Exch., 164.

[9] *Graysbrook* v. *Fox*, Plowd., 282.

[10] *Supra*, p. 313.

in the executor as such. Under s. 44, Rule (*b*) of the Civil Procedure Code,[1] "No claim by or against an executor, administrator or heir, as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues, or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for, with the deceased person whom he represents," and by section 437 of the same Code it is further provided that, "in all suits concerning property vested in a trustee, executor or administrator, when the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested; and it shall not ordinarily be necessary to make such persons parties to the suit; but the Court may, if it think fit, order them or any of them to be made such parties."

In respect of causes of action which survive, an executor has the same power to sue as the deceased had while living.[2] He has also similar powers to distrain for rents due at the time of the testator's death.[3] As to causes of action which survive, s. 268 of the Indian Succession Act, and s. 89 of the Probate and Administration Act provide that all demands whatsoever, and all rights to prosecute or defend any action or special proceeding, existing in favour of, or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory.[4] Thus, where the plaintiff in a divorce suit dies the cause of action will not survive.

Under s. 438 of the Code of Civil Procedure executors who have proved the will must be made parties to a suit against one or more of them, but executors who have not proved the will need not be joined as parties.

As to the disposal of property, the power of an executor under the Indian Succession Act is unqualified. He may dispose of the property of the testator either wholly or in part in such manner as he thinks fit.[5] In this respect his

[1] Act XIV of 1882.

[2] Indian Succession Act, s. 267; Act V of 1881, s. 88.

[3] *Ibid.*

[4] Act XII of 1855 provides that executors may sue and be sued in certain cases for wrongs committed in the lifetime of a deceased person. See *Powell* v. *Rees*, 7 A. and E., 426, and *Richmond* v. *Nicholson*, 8 Scott's Ca., 134; *Kirk* v. *Jodd*, L. R., 21 Ch. D., 484; See 3 and 4 Will. IV, c. 42, s. 2.

Act XIII of 1855 further makes provision for suits for compensation to families for loss occasioned by the death of a person caused by actionable wrongs. That Act corresponds with LORD CAMPBELL'S Act, 9 and 10 Vict., c. 93.

[5] Indian Succession Act, s. 269.

position is the same as that of an executor in respect to personalty under the English law, the general rule in England being that an executor in his lifetime may dispose of and alien the assets of the testator and that for this purpose he has absolute power over them, and they cannot be followed by the creditors of the deceased.[1] "It would be monstrous," said LORD MANSFIELD, "if it were otherwise, for them no one could deal with an executor." So, in *Scott* v. *Tayler*,[2] LORD THURLOW said :—"It is of great consequence that no rule should be laid down here which may impede executors in their administration or render their dispositions of the testator's effects unsafe or uncertain to a purchaser. His title is complete by sale and delivery; what becomes of the price is no concern of his. This observation applies equally to mortgages or pledges, and even to the present instances where assignable bonds were merely without assignment."[3]

The pledgee from an executor of the assets of the testator may sell them if they are not redeemed within the proper time and the purchaser from him will take a valid title.[4]

In the case of a will made after the Succession Act came into force, by an Englishman domiciled in India, charging the testator's estate with the payment of debts, the executors borrowed money wherewith to discharge debts incurred by them in the administration of the estate; and in their capacity of executors gave a bond for the repayment of the amount borrowed on a particular date, and at the same time mortgaged all their right, title and interest in certain real estate of the testator as further security, giving a power of sale, on default being made, to the mortgagee. By a third instrument, they further constituted the lender their true and lawful attorney to sell the real estate mortgaged. Default having been made, the mortgagee, under such power-of-attorney, conveyed the real estate and all the estate and interest of the executor therein, free from the mortgage, to a third person in consideration of a sum of Rs. 35,000. The purchaser, who was resisted in his attempts to get possession by one of the legatees of the testator, brought a suit for a declaration of his title and for possession of the property comprised in the conveyance. The legatee contended that the executors had no authority to confer a power of sale; but a Full Bench of the High Court at Allahabad held (STUART, C. J., dissenting) that the executors had such a power under s. 269 of the Indian Succession Act, and that the conveyance was accordingly valid and operated to transfer the property to the purchaser.[5]

[1] *Whale* v. *Booth*, 4 T. R., 625.

[2] 2 Dick. 725.

[3] Williams on Executors, 939; *Mead* v. *Orrery*, 3 Atk., 239; *Russel* v. *Plaice*, 18 Beav., 28, 29.

[4] *Russel* v. *Plaice*, 18 Beav., 28, 29.

[5] *Seale* v. *Brown*, I. L. R., 1 All., 710. See *Russel* v. *Plaice*, 18 Beav., 21; 18 Jur., 254; 23 L. J., Ch., 441.

The power of an executor must be taken to be unqualified only in respect of the property still vested in him. If he should have assented to a specific legacy, his assent has the effect of divesting his interest as executor in the subject matter of the legacy and transferring the property in it to the legatee,[1] and he becomes, until delivery, a mere trustee for the legatee.[2] After assenting to a specific legacy, therefore, his right of disposal ceases, although, until assent, a sale or mortgage of the legacy is valid.[3] In England, LORD ST. LEONARDS, in his Treatise on Vendors and Purchasers,[4] considered it doubtful whether it was safe to take an assignment of a specific legacy from the executor without the concurrence of the specific legatee, lest the executor should have assented to the bequest, and he cited *Tomlinson* v. *Smith*.[5] But Mr. Coote[6] observes, that this was a case of gross fraud, and concludes from all the cases that if a purchaser or mortgagee shall *bonâ fide* deal with an executor within a reasonable time after the testator's death, and obtain possession of the muniments of title, a specific legatee would never be permitted at law or in equity to set up the executor's assent against the sale or mortgage, for by sale and delivery the title of the purchaser or mortgagee is complete. However, the general rule certainly is that, at law, the title to any specific thing bequeathed vests, upon the assent of the executor, absolutely in the legatee. And even in equity, if the legatee, after the assent, were to assign to a *bonâ fide* purchaser, the title of the assignee would be better than that of any subsequent purchaser from the executors.[7]

Previous to the Hindu Wills Act, which made s. 179 of the Indian Succession Act applicable to Hindus and others to whom that Act applied, the executor of the will of a Hindu, as we have seen, took nothing from the grant of probate, his title being founded simply and solely upon the will of his testator.[8] His powers of dealing with the property of the deceased therefore were only such as the express words of the will gave him.[9] In a case before the Hindu Wills Act,

[1] Indian Succession Act, s. 293; Act V of 1881, s. 113.

[2] *Dix* v. *Burford*, 19 Beav., 409.

[3] See Indian Succession Act, s. 269, illustration, (*a*).

[4] Vol. II, p. 56, 9th edn.

[5] Finch, 378.

[6] Mort. p. 281.

[7] Williams on Executors, 938 note (*i*): *Ewer* v. *Corbet*, 2 P. Wms., 149; Lewin on Trusts, 419. Intestate and Testamentary Succession in India, p. 277.

[8] *Sharo Bibi* v. *Buldeo Dass*, 1 B. L. R., O. C., 24; *Tiruvalur* v. *Kerustnappa Mudali*, 1 Mad. H. C. R., 59.

[9] *Srimaty Jaykali Debi* v. *Shibnath Chatterjee*, 2 B. L. R., *O. C.*, 1 *per* PHEAR, J. See *Sreemutty Dossee* v. *Tarachurn Coondoo Chowdhry*, Bourke, Part VII, 48; *Hoopoman Prasad Panday* v. *Musst. Baboee Munraj Kanwaree*, 6 Moore's I. A., 393. See *Lal Chand Ramdyal* v. *Gumtibai*, 8 Bom. H. C. R., 150, 151; and *Dhun Ray* v. *Broughton*, 15 B. L. R., O. C., 7. See also *Treepoorasoodery Dossee* v. *Debendronath Tagore*, I. L. R., 2 Cal., 45; *Kherodmoney Dossee* v. *Doorgamoney Dossee*, 2 C. L. R., 112 and 3 C. L. R., 315, (S. C.) I. L. R., 4 Cal., 455.

where an executor under a Hindu Will, in order to save the estate from sale in execution of a decree against his testator, raised a loan upon a mortgage of the testator's estate, it was held, that even if the executor had funds with which he might have paid off the decree, the mortgagee's claim was good, unless he knew of the existence of such funds, or might, by the exercise of ordinary diligence, have known of them.[1]

The Hindu Wills Act may be said to have extended the powers given by the Indian Succession Act to executors of the wills of Hindus. Now, however, that Act must be read with the amendment made by s. 154 of the Probate and Administration Act. The effect of the Probate and the Administration Act was to take out of the Hindu Wills Act the sections of the Indian Succession Act (with the exception of s. 187) relating to probate and executors which had been incorporated by s. 2 and to re-enact them with slight modifications, but with wider application.[2]

The Probate and Administration Act, however, by s. 90 gave a much less extensive power to deal with the testator's property than that was given to executors by the Indian Succession Act, in so far that it made the consent of the Court necessary to every disposition of property by an executor[3]. The reason for the marked distinction in the powers conferred upon executors by the two Acts was, apparently, that the Legislature considered it unsafe to extend to executors and administrators in the Mofussil, the full powers conferred by the Indian Succession Act.

Section 90 of the Probate and Administration Act, as it was originally enacted, has been repealed by Act VI of 1889, and the following has now been substituted for it:—"(1) An executor or administrator has, subject to the provisions of this section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under section 4. (2) The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order. (3) An administrator may not, without the previous permission

[1] *Kalee Narain Roy Chowdhry* v. *Ram Coomar Chand*, W. R. for 1864, p 99.

[2] See *supra*, pp. 311–312.

[3] Section 90 of the Probate and Administration Act was originally as follows:—An executor or administrator has power, with the consent of the Court by which the probate or letters of administration was or were granted, to dispose of the property of the deceased, either wholly or in part, in such manner as he thinks fit: Provided that the Court may, when granting probate or letters of administration, exempt the executor or administrator from the necessity of obtaining such consent as to the whole or any specified part of the assets of the deceased.

of the Court by which the letters of administration were granted,—(*a*) mortgage, charge or transfer by sale, gift, exchange or otherwise any immoveable property for the time being vested in him under section 4, or (*b*) lease any such property for a term exceeding five years. (4) A disposal of property by an executor or administrator in contravention of sub-section (2) or sub-section (3), as the case may be, is voidable at the instance of any other person interested in the property. (5) Before any probate or letters of administration is or are granted under this Act there shall be endorsed thereon or annexed thereto a copy of sub-sections (1), (2) and (4), or of sub-sections (1), (3) and (4), as the case may be. (6) A probate or letters of administration shall not be rendered invalid by reason of the endorsement or annexure required by the last foregoing sub-section not having been made thereon or attached thereto, nor shall the absence of such an endorsement or annexure authorise an executor or administrator to act otherwise than in accordance with the provisions of this section." The powers, therefore, of executors to whom the Probate and Administration Act is applicable have been considerably extended by the amending Act.

An executor is in the position of a trustee for the persons interested in the estate.[1] In England, if he purchases directly or indirectly through the medium of a trustee any part of the assets, he is liable to account for the utmost advantage made by him out of the subject purchased.[2] Under the Indian Acts,[3] the sale is voidable at the instance of any other person interested in the property sold.

Co-executors, in England, however, numerous, are regarded in law as an individual person, and the acts of any one of them in respect of the administration of the effects, are deemed to be the acts of all, inasmuch as they have all a joint and entire authority over the whole property.[4] So, in India where there are several co-executors the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will.[5] Thus, one of several executors has power to release a debt,[6] or settle an account with a person accountable to the estate, and, in the absence of fraud, the settlement will be binding on the others, even though they may have dissented.[7] So, he may surrender a lease,[8] sell, grant or assign a term or other property,[9]

[1] *Hall* v. *Hallet*, 1 Cox., 134.

[2] *Ibid.*, *Evans* v. *Jackson*, 8 Sim., 217.

[3] Indian Succession Act s. 270; Act V of 1881, s. 91.

[4] Williams on Executors, 950.

[5] Indian Succession Act, s. 271; Act V of 1881, s. 92.

[6] Indian Succession Act, s. 271, illustration (*a*); *Jacomb* v. *Harwood*, 2 Ves., Sen., 267

[7] *Smith* v. *Everett*, 27 Beav., 446; see *Turner* v. *Hardey*, 9 M. and W., 776; *Charlton* v. *Durham*, L. R., 4 Ch., 433.

[8] Indian Succession Act, s. 271, illustration (*b*).

[9] *Ibid.*, illustration, (*c*); *Simpson* v. *Gutteridge*, 1 Madd., 616.

assent to a legacy,[1] or endorse a promissory note. In fact, one of several executors has all the powers which the Legislature has seen fit to confer upon a sole executor, unless the will otherwise directs, as where the will appoints a number of executors and directs that two shall form a quorum. In that case no act can be done by a single executor.

The fact that a direction in a will that two or more of several executors appointed shall form a quorum will make invalid any act done by one renders it unsafe for any one to deal with a single executor, unless he sees the probate and ascertains that there is no such direction in the will. Where there are several executors appointed, one of them cannot exercise the powers of the others without having proved the will. In the case of Hindus and Mahomedans, executors governed by the Probate and Administration Act are not bound to take out probate, but it seems that one of several such executors cannot carry on a suit without first taking out probate.[2]

Where one of several executors dies, the powers of the office become vested in the survivors.[3] On the death of a sole executor or last surviving executor, leaving assets of the testator unadministered, the administrator of such assets has he same power as the original executor.[4] A married woman to whom probate has been granted has all the powers of an ordinary executor. In cases to which the Indian Succession Act applies, probate cannot be granted to a married woman without the consent of her husband.[5] But such consent is not necessary in cases coming under the Probate and Administration Act.

The powers of Mahomedan executors to whom the Probate and Administration Act applies, are no longer, it seems, determined by Mahomedan Law, but by the provisions of that Act.[6]

I now pass on to consider the duties of an executor.

It is the duty of an executor to perform the funeral of the deceased in a manner suitable to his condition, if the testator has left property sufficient for the purpose,[7] or, in cases coming within the Probate and Administration Act, to provide funds necessary for the performance of the requisite funeral ceremonies. Under Hindu Law such ceremonies are required to be performed by the members of the family of the deceased. Where there is no direction in the will as to how

[1] *Ibid.*, illustration (*d*).

[2] *Shaik Moosa* v. *Shaik Essa*, I. L. R., 8 Bom., 241; see *supra*, p. 322.

[3] Indian Succession Act, s. 272; Act V of 1881, s. 93; *Flanders* v. *Clarke*, 1 Ves. Sen., 9; *Hudson* v. *Hudson*, Cas. Temp. Talbot, 127.

[4] *Ibid.*, s. 273; Act V of 1881, s. 94.

[5] Indian Succession Act, s. 183.

[6] *Shaik Moosa* v. *Shaik Essa*, I. L. R., 8 Bom., 241, p. 256.

[7] Indian Succession Act, s. 275.

the obsequies of the deceased are to be performed, the executor must be guided, as to the amount of the fund which he provides for the purpose, by the amount usually expended at the funeral ceremonies of persons of the same rank and fortune.[1]

In a case in England, a question was raised as to the duty of executors in disposing of the body of the testator, and it was held that although there is no property in the dead body, yet the executors are entitled to possession of it, and that their duty is to bury it.[2] The testator in that case had directed that his body should be burned by a person named by him, and that the expenses should be paid by the executors. The body was in the first instance buried with the assent of the executors, but subsequently the person named removed the body, and had it burned in Italy and sued the executors for the expenses which she had incurred. It was held that the direction in the will as to the disposition of the testator's body could not be enforced and the suit was dismissed. The Court questioned whether it was even lawful in England to burn a dead body.

On an application for probate under s. 244[3] of the Indian Succession Act or s. 62 of the Probate and Administration Act, an executor must state the amount of assets likely to come to his hands, but under s. 277 of the Indian Succession Act and s. 98 of the latter Act, as amended respectively by ss. 7 and 15 of Act VI of 1889, a further duty is cast upon him of exhibiting within 6 months from the grant of probate, or within such further time as the Court, which granted the probate, may from time to time appoint, an inventory containing a full and true estimate of all the property in possession and all the credits, and also all the debts owing, to which the executor is entitled in that character, and also of exhibiting within one year from the same date an account of the estate showing the assets which may have come to his hands, and the manner in which they may have applied or disposed of; and certain penalties are provided for non-compliance with the terms of the section.[4]

[1] See *Mullick* v. *Mullick*, 1 Knapp., 245; Williams on Executors, 972-6.

[2] *Williams* v. *Williams*, L. R., 20 Ch. D., 659.

[3] As amended by Act VI of 1889, s. 3.

[4] Section 277 of the Indian Succession Act, as amended of ss. 7 and 15, of Act VI of 1889 exactly corresponds with s. 98 of the Probate and Administration Act, as amended by the same Act. The following are the terms of the amended sections:—

"(1) An executor or administrator shall within six months from the grant of probate or letters of administration, or within such further time as the Court, which granted the probate or letters, may from time to time appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character, and shall in like manner, within one year from the grant or within such further time as the said Court may from time to time appoint, exhibit an account of the estate, showing the assets

According to the rules of the High Court at Calcutta, in all cases in which executors or administrators neglect to file their inventories or accounts for two months beyond the time allowed to them by law, the Registrar is ordered to issue necessary citations and other process to compel the filing of the same and to charge the parties making default with the costs thereof.[1]

In all cases where a grant has been made of probate intended to have effect throughout the whole of British India, the executor of any person dying in British India and leaving property in more than one province, must include, in the inventory of the effects of the deceased, his moveable or immoveable property situate in each of the provinces: and the value of such property in each province respectively must be separately stated in the inventory.[2]

One of the most important duties of an executor is the collection of the debts due to the testator at the time of his death and the payment of the testator's debts. In the collection of the former he must exercise reasonable diligence,[3] and if by neglecting to get in any part of the property he occasions loss he will be held liable to that extent.[4] Thus, if by unduly delaying to bring an action he enables a debtor of the deceased to avail himself of the statute of limitations he will be personally liable.[5]

which have come to his hands and the manner in which they have been applied or disposed of.

"(2) The High Court may from time to time prescribe the form in which an inventory or account under this section is to be exhibited.

"(3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under section 176 of the Indian Penal Code.

"(4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under section 193 of that Code"

[1] Rule 690, Belchambers's Rules and Orders, p. 276. Mr. Belchambers, in his note to this rule, points out, that no citation has been issued by the Registrar *ex-officio* since 1848.

[2] Indian Succession Act, s. 277A, and Probate and Administration Act, s. 99, as amended respectively by ss. 8 and 16 of Act VI of 1889. The following rule obtains in the High Court, Calcutta: "In all cases in which it is sought to obtain an unlimited grant of probate or letters of administration, it must stated in the petition that, so far as the petitioner has been able to ascertain and is aware, there are no property and effects besides those specified as required by s. 277A of the Indian Succession Act: and the petitioner shall undertake, in case of its being afterwards found that there are other properties and effects, that he will pay the court-fee payable in respect thereof, and also, in the case of letters of administration, that he will give such further bond (of the nature contemplated by s. 256 of the Succession Act), with a surety or sureties as he may at any time be called on by the Registrar to give."—Belchambers's Rules and Orders, p. 281.

[3] Indian Succession Act, s. 275; Act V of 1881, s. 100.

[4] *Ibid.*, 328; Act V of 1881, s. 147.

[5] *Hayward* v *Kinsey*, 12 Mod., 573; Williams on Executors, p. 990.

If the assets are accidentally lost or destroyed, the executor will not, in general, be liable.[1] It is otherwise where he ought to have sold or converted the assets, and they are subsequently lost.[2] There is, however, no fixed period within which executors and administrators must realize assets outstanding upon improper investment, and the period at which the loss is to be calculated depends on the particular nature of the property and the evidence of the case.[3] But an executor will be responsible if he allow money to remain on personal security longer than is absolutely necessary.[4] And he will be personally liable if he leave outstanding a debt to the testator from a defaulting co-executor.[5] Where an executor employs an agent to collect money under circumstances which make such employment proper, and the money is lost by the agent's insolvency, the burden of proof is not on the executor to show that the loss was not attributable to his own fault but on the persons who seek to charge him to prove that it was.[6]

An executor cannot carry on the trade of the testator, except for a reasonable time for the purpose of winding it up,[7] but he may, and in some cases is, bound to complete contracts entered into by the testator.[8] If he should carry on the business of the testator, he will render himself liable on all debts contracted in the course of the business after the testator's death.[9] Where a trader by his will has directed his executors to carry on his trade and to employ a specific portion of the estate for the purpose, the rule is, that although the executor is personally liable for debts incurred by him in carrying on the trade pursuant to the will, he has the right to resort for his indemnity to the specific assets so directed to be employed, but no further.[10]

As to the payment of debts, the Indian Acts,[11] provide that they shall be paid in following order: 1st, Funeral expenses according to the degree and status of the deceased, death-bed charges including fees for medical attendance and board and lodging for one month previous to his death;[12] 2ndly, Expenses of obtaining probate including costs incurred for, or in respect of any judicial pro-

[1] *Jones* v. *Lewis*, 2 Ves., Sen., 240.

[2] *Clough* v. *Bond*, 3 M. and C., 497; *Fry* v. *Fry*, 27 Beav., 144.

[3] *Hughes* v. *Empson*, 22 Beav., 181.

[4] *Powell* v. *Evans*, 5 Ves., 839.

[5] *Styles* v. *Guy*, 1 Mac. and G., 422; *Candler* v. *Tillett*, 22 Beav., 257. Intestate and Testamentary Succession in India, p. 283.

[6] *In re Brier*, L. R., 27 Ch., 238.

[7] *In re Chancellor*, L. R., 26 Ch. Div., 42.

[8] *Collinson* v. *Lister*, 20 Beav., 355.

[9] *Labouchere* v. *Tupper*, 11 Moo., P. C., 198; *Wightman* v. *Townroe*, 1 M. and S., 412.

[10] *In re Johnson*, L. R. 15 Ch. Div., 548; see *In re Cameron*, L. R., 26 Ch. Div., 19.

[11] Indian Succession Act and Probate and Administration Act.

[12] Indian Succession Act, s. 279; Act VI of 1881, s. 101.

ceedings that may be necessary for administering the estate;[1] 3rdly, Wages due for services rendered to the deceased within three months proceeding his death by any labourer, artizan or domestic servant;[2] 4thly, All other debts, including debts due to the executor equally and rateably as far as the assets of the deceased will extend, no creditor being allowed priority over another by reason of his debt being secured by an instrument under seal or otherwise.[3] What are sometimes called "executorship expenses" or "testamentary expenses"[4] in England mean the expenses which are payable first and second in order, and include costs incurred by executors in obtaining the advice of solicitors or counsel as to the distribution of their testator's estate; also the costs of the executors and other parties in an action, whether instituted by the executors themselves or by a beneficiary, for the administration of the estate: also the funeral expenses; also expenses incurred by the executors for the protection of specific legacies, and payments by the executors in discharge of debts falling due from the testator's estate after his death.[5]

Section 282 of the Indian Succession Act and the corresponding section of the Probate and Administration Act, which direct that all debts known to the executor shall be paid equally and rateably, do not, it has been held, interfere with the right of a decreeholder to have his decree satisfied out of the property of a deceased person to the exclusion of other creditors, after deducting the expenses chargeable.[6]

In England, an executor was entitled to retain his own debt out of legal assets of the testator, although the debt might be barred by the Statute of limitations.[7] Here, however, there is no such right of retainer in priority to the creditors.[8]

[1] *Ibid.*, s. 280; Act V of 1881, s. 102.

[2] *Ibid.*, s. 281; Act V of 1881, s. 103. It will be observed that s. 103 of the Probate and Administration Acts adds the words "according to their respective priorities (if any)" at the end of the section. This seems to have been suggested by the case of *Nil Komul Shaw* v. *Reed*, 17 W. R., 513; (S. C.) 12 B. L. R., 287.

As to what persons may be included in the term 'domestic servant,' see *Dhamo Sirang* v. *Upendro Mohun Tagore*, 8 B. L. R., 244; *Bhim Das* v. *Upendro Mohun Tagore*, 9 B. L. R., App., 5; and *Vithoba Malhari* v. *Corfield*, 3 Bom., H. C. R., App., 21. As to 'labourers' and 'artizans,' see Act XIII of 1859.

[3] *Ibid.*, s. 282; Act V of 1881, s. 104.

[4] Executorship expenses are not distinguishable from testamentary expenses—*Sharp* v. *Lush*, L. R., 10 Ch. D., 468, *per* JESSEL, M. R.

[5] *Sharp* v. *Lush*, L. R., 10 Ch. D., 468; *Penny* v. *Penny*, L. C., 11 Ch. D., 440. See *Miles* v. *Harrison*, L. R., 9 Ch. D., 316; *Harloe* v. *Harloe*, L. R., 20 Eq., 471; *Ralf* v. *Carrick*, L. R., 5 Ch. Div., 984—998; *In re Biel's Estate*, L. R., 16 Eq., 577.

[6] *Nil Komul Shaw* v. *Reed*, 17 W. R., 513; (S. C.) 12 B. L. R., 287.

[7] *Stahlschmidt* v. *Lett*, 1 Sim. and G., 415; *Hill* v. *Walker*, 4 K. and J., 166.

[8] Indian Succession Act, s. 212; Act V of 1881, s. 104; see 32 and 33 Vict., c. 46, as to priority among creditors in England.

In England, in the case of *Richmond* v. *White*,[1] where an executor, who was a creditor of the testator, claimed to retain his own debt out of the moneys paid into the credit of an action by the residuary legatees for administration, in priority to the costs of the action and the debts of the creditors, it was said, that the right of an executor to retain his own debt was not a right which the Court was disposed to extend, and the Court refused to allow the right of retainer. It would appear that an executor who pays such debts as he knows of otherwise than equally and rateably as far as the assets of the deceased will extend, will be personally liable for any loss occasioned to a creditor of the deceased by such improper distribution of the assets;[2] but in order to charge him, his knowledge must be actual as distinguished from constructive or imputable knowledge.[3]

In distributing the assets, an executor or administrator must be careful to pay such debts as have a priority first; for, on a deficiency of assets, if he has, with notice, paid other debts first, he must answer the preferential debts out of his own estate.[4] A testator cannot himself, by the terms of his will, change the legal order of distribution of his assets.[5]

In England, an executor is not bound to plead the Statute of Limitations against the demand of one claiming to be a creditor of the estate.[6] So, in Madras, in 1877 it was held, in the case of *The Administrator-General* v. *Hawkins*,[7] that the Administrator-General was authorized to pay a barred debt.[8] In Bombay, also, it was held, in 1873, that an executor might pay a debt justly due by his testator, though barred by the Statute of Limitations; and that he would in equity be allowed credit for the payment.[9] Now, by s. 28 of the present Limitation Act, XV of 1877, at the determination of the period limited for instituting a suit for possession of any property, the right to the property is extinguished, and it may be questioned whether, having regard to this section, an executor or administrator will now be justified in paying a barred debt.[10]

An executor under a will to which the Hindu Wills Act did not apply, it was held, had no power by acknowledgment to revive a debt barred by limitation, except as against himself.[11]

[1] L. R., 10 Ch. D., 727.

[2] *Asiatic Banking Corporation* v. *Amador Viegas*, 8 Bom. H. C. R., 20.

[3] *Ibid.*

[4] See Williams on Executors, 993 and 1033.

[5] *Turner* v. *Cox*, 8 Moore's P. C., 288. Intestate and Testamentary Succession in India, p. 286.

[6] See *Coombs* v. *Coombs*, L. R., 1 P. and D., 289; *Vane* v. *Rigden*, L. R., 5 Chan., 369.

[7] I. L. R., 1 Mad., 267.

[8] See *Ritchie* v. *Stokes*, 2 Mad. H. C. R., 255, 474.

[9] *Tillackchand Hindumal* v. *Jitamal Sudaram*, 10 Bom. H. C. R., 206.

[10] See *Mohesh Lall* v. *Busunt Koomaree*, I. L. R., 6 Calc., 355; (S. C.) 7 C. L. R, 121.

[11] See *Gopal Narain Mozoomdar* v. *Muddonmutty Guptee*, 14 B. L. R., 21. Intestate and Testamentary Succession in India, p. 287.

Where any property comes into the hands of any Administrator-General under the Regimental Debts Act, 26 and 27 Vict., c. 57, s. 21, he must administer the same in accordance with the provisions of that Act relating to preferential charges; and by s. 4 of the Statute, the following classes of expenses and debts, in the case of an officer or soldier dying on service, are to be considered preferential charges on his personal estate and payable thereout in preference to all other debts and liabilities, and, as among themselves, in the following order:—(1.) Expenses of last illness and funeral, (2.) Military debts. And where the death occurs out of the United Kingdom, (3.) Servants' wages not exceeding two months' wages to each servant, and (4.) Household expenses incurred within a month before the death or the last issue of pay to the deceased whichever is the shorter period. By s. 5 of the Statute, the surplus only of the personal property, after paying the preferential charges, shall be deemed personal estate.

Now, in England, 32 and 33 Vict., c. 46, which does not apply to Scotland, provides (s. 2) that in the administration of the estate of every person who shall die on or after the 1st day of January 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by, or arises under a bond, deed or other instrument under seal, or is otherwise made or constituted a specialty debt, but *all the creditors* of such person, as well special as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding; provided always that the Act shall not prejudice or effect any lien, charge or other security which any creditor may hold or be entitled to for the payment of his debts (s. 1). Now, inasmuch as succession to moveable property of a deceased person is regulated by the law of the country in which he had his domicile at the time of his death,[1] it must frequently happen, that the distribution of the moveable property of a person dying in this country having his domicile elsewhere must be distributed otherwise than under the provisions of the Indian Succession Act or other enactments in India. So far as debts are concerned, s. 283 of the Indian Succession Act, as it was originally enacted, directed that if the domicile of the deceased was not in British India, the application of his moveable property to the payment of his debts was to be regulated by the law of the country in which he was domiciled.[2] That section, however, has been amended by s. 9 of Act VI of 1889, and now in the amended section the law of British India has been substituted for that of the country in

[1] Indian Succession Act, s. 5.

[2] See *Miller* v. *Administrator-General*, I. L. R., 1 Cal., 421; section 283 of the Indian Succession Act is not incorporated in the Probate and Administration Act.

which the deceased was domiciled.[1] In England, also, it is the rule as to personal property that the priorities of creditors are to be regulated by the law of the country in which the testator was domiciled, though the personal assets may be in another country.[2]

As to immoveable property it is almost a universal rule that succession to such property is governed by the *lex loci rei sitae*, or the law of the country in which it is actually situate.[3] In cases, however, of a deceased person not domiciled in India, where a creditor was entitled under s. 283 of the Indian Succession Act to any preference over any class of creditors in India in the application of the moveable property to the payment of his debt, he was not allowed to share in the proceeds of the immoveable property in India, unless he gave up the preference in respect of the moveable property.[4] This rule is analogous to the equitable doctrine of marshalling which in England applies in the case where there are two claimants and two funds, both of which are available to one claimant, but only one to the other. The former is compelled to resort to that fund which the other cannot reach.[5]

The whole estate of the testator being liable in the hands of the executor for the payment of the debts of the testator, all debts of whatever description must be discharged before legacies are satisfied.[6] Even voluntary bonds must be paid by the executor in preference to legacies.[7]

In cases, where the estate of the deceased is subject to any contingent liabilities, the executor, in order to protect himself from possible liability, will not be bound to pay any legacy without a sufficient indemnity being given to meet any liability which may become due.[8] It may happen, for instance, that there are outstanding covenants of the testator which, though yet unbroken, may or may not be broken. Should such covenants be broken the executor would be liable to answer the damage *de bonis propriis*. In *Spode* v. *Smith*,[9] it was held that if an executor, acting *bonâ fide* under the conviction that the assets were amply sufficient for the payment of the testator's debts, permits specific legatees

[1] The illustration to s. 283 of the Indian Succession Act is repealed by s. 9 of Act VI of 1889.

[2] *Wilson* v. *Dunsany*, 18 Beav., 293.

[3] *Birtwistle* v. *Vardill*, 7 Cl. and F., 895. The Indian Succession Act s. 5 adopts the rule.

[4] Indian Succession Act, s. 284. This section is of course not applicable to Hindus etc., and has not been incorporated in the Probate and Administration Act.

[5] See *Galton* v. *Hancock*, 2 Atk., 436; Williams on Executors, 1719 *et seq.*

[6] Indian Succession Act, s. 285; Act V of 1881, s. 105; Williams on Executors, 1347.

[7] *Jones* v. *Powell*, 1 Eq. Ca. Abr., 84, Pl. 2; *Hales* v. *Cox*, 32 Beav., 118; Williams on Executors, 1347.

[8] Indian Succession Act, s. 286; Act V of 1881, s. 106.

[9] 3 Russ. Ch. Cas., 511.

to retain or possess themselves of articles bequeathed to them, he will be answerable for the value of those articles with interest, if there should ultimately be a deficiency of assets, although the deficiency should be caused by subsequent events which he had no reason to anticipate.

In England, ROMILLY, M. R., expressed an opinion, that where the estate is administered in Court, and an executor acts under the orders of the Court,[1] he will be protected from liability in all cases, and this appears to be now fully established.[2] After the payment of debts and necessary expenses, that is, funeral and testamentary expenses,[3] specific legatees are to be discharged without any abatement, except where there are specific legatees of a particular fund, in which case there may be an abatement of the legacies *inter se*.[4] The general estate, being primarily liable for the payment of debts and necessary expenses, all that is not specifically bequeathed must be exhausted before specific legatee, can be called upon to contribute.[5] If, therefore, the assets, after payment of debts, necessary expenses, and specific legacies, are not sufficient to pay all the general legacies in full, the latter must abate or be diminished in equal proportions and the executor has no right to pay one legatee in preference to another, nor to retain any money on account of a legacy to himself or to any person for whom he is a trustee.[6] Even where there is a bequest of specific chattels charged with the payment of a pecuniary legacy and of all the testator's just debts and funeral and testamentary expenses, the general undisposed of residue will be applied in the first place to the payment of the charge.[7]

The fact that a legacy is given to a wife or child otherwise unprovided for,[8] or for a charity,[9] or to an executor for his care and trouble,[10] will not privilege it from abatement. In England, it seems that if there be any valuable consideration for the testamentary gift, as where a general legacy is given in consideration of a debt owing to the legatee, or of the relinquishment of any right or interest, such legacy will be entitled to a preference of payment over the other general legacies, which are mere bounties,[11] but the debt or interest must

[1] In *Dean* v. *Allen*, 20 Beav., 1.

[2] *England* v. *Tredegar*, L. R., 1 Eq., 344. See *Brewer* v. *Pocock*, 23 Beav., 310. See also 22 and 23 Vict., c. 35, s. 29. Intestate and Testamentary Succession in India, p. 289.

[3] See Indian Succession Act, ss. 279, 280; *Sharp* v. *Lush*, 10 Ch. D., 468.

[4] *Sleech* v. *Torrington*, 2 Ves. Sen., 564; *Page* v. *Leapingwell*, 8 Ves., 463; *Re Jeffrey's Trust*, L. R., 2 Eq., 68.

[5] See *Baker* v. *Farmer*, L. R., 3 Ch., 537.

[6] Indian Succession Act, s. 287; Act V of 1881, s. 107.

[7] *Hewett* v. *Snare*, 1 DeG. and Sm., 333.

[8] *Blower* v. *Morret*, 2 Ves. Sen., 420.

[9] *Attorney-General* v. *Robins*, 2 P. Wms., 22; *Duncan* v. *Watts*, 16 Beav., 204.

[10] *Fretwell* v. *Stacy*, 2 Vern., 434.

[11] Williams on Executors, 1370-1.

be in existence at the testator's death.[1] It has been held that the rule does not apply to a bequest to pay the debts of the testator where the creditors have received a composition of less than their amount;[2] or to a bequest to pay the debts of a third person, whether he be a relative or not.[3]

In England, if an intention can be collected that particular legacies shall have a preference, that intention must be followed;[4] but a mere direction that a legacy is to be paid in the first place, or immediately, or a direction as to the time of payment, will not save legacies from the abatement.[5] But where the testator directs that a particular legacy shall be paid at all events, or that a particular legatee shall be paid her legacy in full,[6] or, having given several legacies, he afterwards adds, that as there will be a considerable surplus he gives further legacies,[7] the particular legacy, or the first given legacies, shall have a preference.[8] The fact that the time for payment of a legacy is deferred, will not give other legacies priority in the distribution of assets.[9] In all cases the *onus* lies on the party seeking priority to make out clearly and conclusively that such priority was intended.[10]

Annuities, in England, charged on personal estate are dealt with as general legacies and abate with them.[11] So, in India, a legacy for life, sums appropriated by will to produce an annuity, and the value of an annuity, where no sum has been appropriated, are treated as general legacies for the purpose of abatement.[12] For the purpose of abatement the value of annuities must be ascertained.[13] Strictly speaking, there is no residue until all debts and legacies have been paid, A residuary legatee, therefore, cannot call upon general legatees to abate.[14]

Where there is a demonstrative legacy, and the assets are sufficient for the payment of debts and necessary expenses, the legatee has a preferential

[1] *Burridge* v. *Bradyl*, 1 P. W., 127; *Blower* v. *Morret*, 2 Ves. Sen., 420; *Heath* v. *Dendy*, 1 Russ., Ch. Ca., 543.

[2] *Coppin* v. *Coppin*, 2 P. W., 296.

[3] *Shirt* v. *Westby*, 16 Ves., 393

[4] *Lewin* v. *Lewin*, 2 Ves. Sen., 416.

[5] *Blower* v. *Morret*, 2 Ves. Sen., 420.

[6] *Marsh* v. *Evans*, 1 P. W., 668.

[7] *Attorney-General* v. *Robins*, 2 P. W., 24.

[8] See *Johnson* v. *Johnson*, 14 Sim., 313; *Stammers* v. *Halilley*, 12 Sim., 42.

[9] *Nickisson* v. *Cockill*, 9 Jur., N. S., 975.

[10] *Miller* v. *Huddlestone*, 3 Mac. and G., 513. Intestate and Testamentary Succession in India, pp. 290-291.

[11] *Miller* v. *Huddlestone*, 3 Mac. and G., 513; *Hume* v. *Edwards*, 3 Atk., 693.

[12] Indian Succession Act, s. 291; Act V of 1881, s. 111.

[13] As to the mode of ascertaining the value of annuities, see *Todd* v. *Bielby*, 27 Beav., 353; *Potts* v. *Smith*, L. R., 8 Eq., 683; see *supra* p. 300.

[14] *Re Lyne's Estate*, L. R., 8 Eq., 482.

claim for payment of his legacy out of the fund from which the legacy is directed to be paid, until such fund is exhausted.[1] If, however, after the fund is exhausted, part of the legacy still remains unpaid, he is entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder.[2] In other words, a demonstrative legacy is liable to abate with general legacies when it becomes a general legacy by reason of the failure of the fund out of which it is payable.[3] If the assets are not sufficient to answer the debts and the specific legacies, an abatement must be made from the latter ratably in proportion to their respective amounts.[4]

The title of a legatee to his legacy is not complete until the executor has assented to it.[5] But before such assent, the legatee has an inchoate right to the legacy which is transmissible to his personal representatives in case of his death before it is paid or delivered.[6] The rule as to the necessity for the executor's assent is imposed by the law for the protection of the executor, who is responsible to the creditors for the satisfaction of their claims to the extent of the whole estate, without regard to the testator's having by his will directed that a portion of it should be otherwise applied.[7] The assent may be verbal, and it may be either express or implied from the conduct of the executor.[8] Once given, the assent, it seems, cannot be retracted. Accordingly, where executors have set apart and appropriated assets to meet a legacy they cannot retain or impound any part of the appropriated assets to meet a debt due from the legatee to the general estate of the testator.[9]

The assent of executors to a legacy may be conditional, and, unless the condition, where it is one which they may enforce, be performed, there is no assent and the title of the legatee is not completed.[10] Even in the case of a legacy to himself, the assent of an executor is necessary to complete his title, and such assent will be implied if in his manner of dealing with the property of the testator he does any act which is referable to his character of legatee and not to his character of executor.[11]

[1] Indian Succession Act, s. 289; Act V of 1881, s. 109.

[2] *Ibid.*

[3] *Mullins* v. *Smith*, 1 Dr. and Sm., 210, *per* KINDERSLEY, V. C.; see *Creed* v. *Creed*, 11 Cl. and Fin., 509.

[4] *Ibid.*, s. 290; Act V of 1881, s. 10; see Williams on Executors, p. 1377; *Sleech* v. *Torrington*, 2 Ves. Sen., 561—564.

[5] Indian Succession Act, s. 292; Act V of 1881, s. 112.

[6] Williams on Executors, p. 1378.

[7] *Ibid.*

[8] Indian Succession Act, s. 293; Act V of 1881, s. 113.

[9] *Ballard* v. *Marsden*, L. R., 14 Ch. Div., 374.

[10] Indian Succession Act, s. 294; Act V of 1881, s. 114.

[11] Indian Succession Act, s. 295; A4t V of 1881, s. 115.

The effect of the assent of the executor to a specific bequest is to divest his interest as executor therein, and to transfer the subject of the bequest to the legatee, unless the nature or the circumstances of the property require that it should be transferred in a particular way.[1] Upon assenting to a specific legacy the executor becomes a trustee for the legatee.[2] In the case of a legacy to executors in trust for certain purposes mentioned by the will, their assent has the effect of causing the bequest to cease to be part of the testator's estate, and to convert the executors into trustees for those who are beneficially interested.[3]

Although the assent of the executor gives effect to a legacy as from the death of the testator,[4] the executor is not bound to deliver any legacy until one year from the death of the testator.[5] This is a mere rule of convenience adopted to give the executor sufficient time to inform himself of the state and amount of the testator's assets and discharge the debts of the deceased, and it does not in any way prevent the vesting of the legacies.[6] Even where the testator has directed that payment of the legacies should be made before the expiration of a year from his death, the executor is not bound to make the payment before the expiration of the year.[7] Where, however, a testator gives an absolute discretion to his executors to postpone the sale and conversion of his estate, they are not bound by the rule to convert the property within a year, even though some of the property consists of shares in an unlimited Company, and, in the absence of *mala fides*, they are not liable for loss arising to the estate for non-conversion.[8]

An executor who pays a legacy admits assets for the payment of all. If the payment be made voluntarily and there should be a deficiency to pay the other legacies, the executor cannot call upon the legatee to refund,[9] unless the payment were made under a mistake of facts,[10] or debts of which he had no notice afterwards appear.[11] If, however, the payment were made under an order of a Judge, he may in such a case do so.[12]

[1] Indian Succession Act, s. 293; Act V of 1881, s. 113.

[2] *Dix* v. *Burford*, 19 Beav., 402.

[3] *Ibid.*

[4] Indian Succession Act, s. 296; Act V of 1881, s. 116.

[5] Indian Succession Act, s. 297; Act V of 1881, s. 117.

[6] *Garthshore* v. *Chalie*, 10 Ves., 13.

[7] *Brooke* v. *Lewis*, 6 Madd., 358; see *Benson* v. *Maude*, 6 Madd., 15.

[8] *In re Norrington*, L. R., 13 Ch. D., 654.

[9] Indian Succession Act, s. 317; Act V of 1881, s. 136.

[10] See *Livesey* v. *Livesey*, 3 Russ., 287.

[11] Indian Succession Act, s. 319; Act V of 1881, s. 138; *Nelthorp* v. *Biscoe*, 1 Ch. Ca., 136.

[12] Indian Succession Act, s. 316; Act V of 1881, s. 135.

As a general rule a creditor of the testator may compel a legatee who has been paid to refund, whether the assets of the testator were or were not sufficient at the time of his death to pay both debts and legacies, and whether the payment of the legacy by the executor was voluntary or not.[1] But he must do so by suit instituted within three years from the date of the payment.[2]

If an executor gives such notices for creditors to bring in their claims as are required by the High Court before he distributes the estate, he will not be liable to any creditor of whose claim he had no notice.[3] But, although the executor is discharged, any creditor may within three years from the distribution,[4] follow the assets into the hands of the persons who may have received them.[5] The right of a creditor to make legatees refund may, apparently, be lost by *laches*, acquiescence or such conduct as would make it inequitable for the Court to allow such right.[6]

An unpaid legatee or a legatee who has been compelled to refund by a creditor cannot compel a legatee who has been paid to refund any part of his legacy where the assets were originally sufficient to pay all, whether the legacy were paid to him with or without suit, and whether the assets might have subsequently become deficient by the devastavit of the executor,[7] or from accidental circumstances.[8] It is otherwise where the assets were not originally sufficient.[9] But in that case the legatee must proceed in the first place against the executor if he is solvent,[10] because, the assets being insufficient, the payment of any one or more of the legacies was a devastavit.[11] If the executor is insolvent, or not liable to pay, the unsatisfied legatee can oblige each legatee, who has been satisfied, to refund in proportion.[12] Where a legatee is compelled to refund any portion of his legacy, interest is not chargeable against him, and in all cases the refunding, as between legatees, must not exceed the sum by which the satisfied legacy ought to have been reduced, if the estate had been properly administered.[13]

[1] Indian Succession Act, s. 321; Act V of 1881, s. 140.

[2] Act XV of 1877, Sched II, Art. 43; see *Gillespie* v. *Alexander*, 3 Russ. Ch. Ca., 136, 7.

[3] Indian Succession Act, s. 320; Act V of 1881, s. 139.

[4] Act XV of 1887, Sched. II, Art. 43.

[5] Indian Succession Act, s. 320; Act V of 1881, s. 139. See 9 Geo. IV, c. 33.

[6] *Ridgway* v. *Newstead*, 30 L. J., Ch., 889.

[7] Indian Succession Act, s. 322; Act V of 1881, s. 141.

[8] *Fenwick* v. *Clarke*, 31 L. J., Ch., 731; see *Peterson* v. *Peterson*, L. R., 3 Eq., 111.

[9] Indian Succession Act, s. 323; Act V of 1881, s. 142.

[10] *Ibid.*

[11] *Orr* v. *Kaines*, 2 Ves. Sen., 194.

[12] Indian Succession Act, s. 323; Act V of 1881, s. 142; see 1 Roper in Legacies, p. 459, 4th Edn.

[13] Indian Succession Act, ss. 324, 325; Act V of 1881, ss. 143, 144.

After the payment of the debts and legacies the surplus or residue must be paid to the residuary legatee, where such a legatee has been appointed by the will.[1] If he shall have died before payment of debts and legacies, the residue will devolve upon his representatives.[2]

Chapter XXXVII of the Indian Succession Act and Chapter X of the Probate and Administration Act, provide rules for the conversion of the testator's estate, the investment of funds to provide for legacies, other than specific legacies, where such legacies are given for life,[3] or are payable at a future time,[4] or are contingent.[5]

In the case of a bequest of a residue to a person for life without any direction to invest the same in any particular securities, the subject of the bequest must, under s. 305[6] of the Indian Succession Act, be converted and invested in securities sanctioned by the High Court. If there be such a direction, then, under that Act and also under the Probate and Administration Act, the residue of the estate must be converted and invested in securities of the kind specified.[7] The time and manner in which the conversion and investment must be made is in the discretion of the executor, but until the conversion and investment is completed, the person who would, for the time being, be entitled to the income of the fund, when so invested, is entitled, under the Indian Succession Act,[8] to interest at 4 per cent., and, under the Probate and Administration Act,[9] to interest at 6 per cent. per annum upon the market value (to be computed as of the date of the testator's death) of such part of the fund as shall not have been invested in the specified securities. In England, if an executor is expressly directed to convert the estate, either immediately or within a reasonable time, and he retains investments made by the testator without reasonable excuse, he will be charged in the case of loss or depreciation with the amount which the investments would have produced if converted at the time when the conversion ought to have been made.[10]

[1] Indian Succession Act, s. 326; Act V of 1881, s. 145.

[2] Indian Succession Act, s. 91.

[3] Indian Succession Act, ss. 301—305 and 306; Act V of 1881, ss. 121, 125.

[4] Indian Succession Act, s. 302; Act V of 1881, s. 122.

[5] Indian Succession Act, s. 304; Act V of 1881, s. 124.

[6] There is no section in the Probate and Administration Act corresponding with s. 305 of the Indian Succession Act.

[7] Indian Succession Act, s. 306; Act V of 1881, s. 125.

[8] Indian Succession Act, s. 307.

[9] Act V of 1881, s. 126.

[10] See *Howe* v. (*Earl of*) *Dartmouth*, 7 Ves., 137; *Brice* v. *Stokes*, 11 Ves., 319, 2 Tudor's, L. C, p. 975, *et seq*

In the case of a bequest to a minor, where, by the terms of the will the minor is entitled to immediate payment or possession of the subject matter of the bequest, and there is no direction in the will to pay or deliver it to any person on his behalf, both the Indian Succession Act[1] and the Probate and Administion Act[1] direct that the executor or administrator shall pay or deliver the same into the Court of the District Judge, by whom, or by whose District Delegate, the probate was, or letters of administration with the will annexed, were granted, to the account of the legatee, unless the legatee be a ward of the Court of Wards; and if the legatee be a ward of the Court of Wards, the legacy shall be paid into that Court to his account, and such payment into the Court of the District Judge, or into the Court of Wards, as the case may be, shall be a sufficient discharge for the money so paid; and such money, when paid in, shall be invested in the purchase of Government securities, which, with the interest thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, as the Judge or the Court of Wards, as the case may be, may direct.

By s. 32 of the Official Trustee's Act, XVII of 1864, it was provided that, "if any infant or lunatic shall be entitled to any gift or legacy or residue or share thereof, it shall be lawful for the executor or administrator by whom such legacy, residue or share may be payable or transferable, or the party by whom such gift may be made, or any trustee of such gift, legacy, or residue or share to pay or transfer the same to the Official Trustee appointed under this Act (XVII of 1864), provided that the leave of the High Court to make such payment shall be first obtained by motion made on petition. Any money or property paid or transferred to the Official Trustee or vested in him under this section (32) shall be subject to the same provisions as are contained in this Act as to other property vested in such Official Trustee under the provisions thereof."[2]

As to allowances for maintenance the general rule in England is, that where a bequest is vested and immediate, so that the legatee, if he were of age, would be entitled to receive his legacy at the end of the year from the testator's death, the Court will order maintenance out of the interest of the legacy, although no express provision be made for maintenance and even though the income be expressly directed to accumulate, provided the parents of the infant legatee are unable to maintain him. But no such allowance will be made by the Court if the parents be of ability,[3] and ability, it seems, must be understood in the sense

[1] S. 308, as amended by Act VI of 1881, s. 8.

[2] S 127.

[3] Williams on Executors, pp. 1416-17. See *Greenwell* v. *Greenwell*, 5 Ves., 194; *Collis* v. *Blackburn*, 9 Ves., 470.

of ability to maintain and educate according to the fortune and expectations of the infant.[1]

The legatee of a specific legacy is entitled from the testator's death to whatever interest or produce accrues in respect of the subject of the legacy, unless the legacy is contingent, in which case he is not entitled to the interest or produce until the vesting of the legacy. In the interval between the testator's death and the vesting of the legacy, the interest or produce forms part of the residue of the testator's estate.[2]

In the case of a general residuary bequest which is vested, the legatee is entitled to the interest or produce of the residuary fund from the death of the testator, but if such a bequest is contingent the interest or produce goes as undisposed of.[3]

In the case of general legacies, if a time is fixed for payment, interest begins to run from the time fixed, but, if no time is fixed, the executor has a year allowed within which to reduce the estate into possession, and, therefore, interest is payable upon legacies from the expiration of that time.[4] It may, and does happen that actual payment in some instances is impracticable within the year, yet in legal contemplation it is considered that the right to payment existed and carried with it the right to interest and actual payment.[5] The rule in case of general legacies where no time is fixed is subject, both in England and this country,[6] to exceptions in the case of legacies in satisfaction of a debt,[7] legacies where the testator was the parent or a more remote ancestor of the legatee, or has put himself in the position of a parent to the legatee,[8] and legacies to minors with a direction that maintenance be paid thereout to the minors,[9] in all of which instances interest is payable from the death of the testator. If no time is fixed, a direction to pay as soon as possible will not entitle an ordinary general legatee to interest before the expiration of a year from the testator's death. If the testator is a parent or a more remote ancestor of the legatee, or has put himself in *loco parentis* to the legatee, and the legatee is a minor, even where a time is fixed by the will for payment, interest is payable, not from the time fixed according to the general rule,

[1] Williams on Executors, p. 1417, note (*o*). Intestate and Testamentary Succession in India, p. 302.

[2] Indian Succession Act, s. 309; Act of V 1881, s. 128.

[3] Indian Succession Act, s. 310; Act V of 1881, s. 129.

[4] Indian Succession Act, s. 311.

[5] *Wood* v. *Penoyre*, 13 Ves., p. 334, *per* GRANT, M. R.

[6] Indian Succession Act, s. 311; Probate and Administration Act, s. 130.

[7] *Clarke* v. *Sewell*, 3 Atk., 99.

[8] *Wilson* v. *Maddison*, 2 J. and C., 372.

[9] *Beckford* v. *Tobin*, 1 Ves. Sen., 380; see in *In Re Richards*, L. R., 8 Eq, 119.

but from the death of the testator, unless a specific sum is given by the will for maintenance.[1]

We have seen that, where no time is fixed, the first payment of an annuity is to be made at the expiration of a year from the testator's death.[2] Even though an earlier period than that is fixed for the first payment, no interest is payable on the arrears of an annuity within the first year from the testator's death.[3] If a sum of money is directed to be invested to produce an annuity, interest is payable upon it from the death of the testator.[4]

The rate of interest upon legacies is 4 per cent. under the Indian Succession Act,[5] and 6 per cent. per annum under the Probate and Administration Act.[6]

In general an executor is personally responsible for any act by which the assets of the testator are wasted or subjected to loss or damage by any mismanagement or misapplication contrary to his duty as an executor,[7] as where he pays an unfounded claim, or neglects to give notice to renew a valuable lease renewable by notice.[8] So, an executor will be liable, if he occasions loss to the estate by neglecting to get in part of the assets.[9] Any mismanagement by the executor by which loss is occasioned to the estate of the testator is termed devastation or a *devastavit*.

An executor is not ordinarily liable for the devastavit of his co-executor of which he was not cognizant,[10] but it is otherwise, if he directly or indirectly contributed to it, as by unnecessarily allowing his co-executor to have possession and control of the assets.[11] In the case of *Shipbrook* v. *Hinchinbrook*,[12] it was held that executors might be charged with negligence by joining in a transfer to a co-executor upon his representation that it was necessary for the purpose of paying off debts, but that they were not liable so far as they might be able to prove the application of the property transferred to that purpose, although

[1] Indian Succession Act, s. 312; Act V of 1881, s. 131.

[2] Indian Succession Act, s. 298; Act V of 1881, s. 118.

[3] Indian Succession Act, s. 314; Act V of 1881, s. 133.

[4] Indian Succession Act, s. 315; Act of V 1881, s. 134.

[5] S. 313.

[6] S. 132.

[7] Bac. Abr., Executors (L) 1; Indian Succession Act, s. 327; Act V of 1881, s. 146.

[8] Indian Succession Act, s. 327, illustrations (*a*) and (*b*).

[9] *Ibid.*, s. 328; Act V of 1881, s. 147.

[10] *Langford* v. *Gascoigne*, 11 Ves., 333; *Dix* v. *Burford*, 18 Beav., 412.

[11] *Langford* v. *Gascoigne*, 11 Ves., 333; *Shipbrook* v. *Hinchinbrook*, 11 Ves., 252; *Candler* v. *Tillet*, 22 Beav., 263.

[12] 11 Ves., 252.

the executor had possession of other funds, not through his co-executors, which he had wasted. If an executor stands by and sees a breach of trust committed by his co-executor, he will be responsible for the breach of trust.[1] Thus, where an executor permitted his co-executor to carry on the trade of the testator and there was a loss, he was held liable.[2]

It is a rule in England that where assets have actually come into the possession of an executor, he is in the position of a gratuitous bailee, and therefore cannot be charged without some wilful default,[3] and there seems nothing in the Indian Acts to militate against that rule being applied in India. In the case of *Job* v. *Job*,[4] the executor delivered part of the stock in trade of the testator, who was a watchmaker, to J., a watchmaker and jeweller, for the purpose of being sold in the ordinary course of trade. J. became bankrupt and his trustee took possession of all his stock in trade, including the goods of the testator, and sold the whole, as being within the order and disposition of the bankrupt. The Master of Rolls (Sir GEORGE JESSEL) held that the executor was not liable, as there had been no wilful default. In order to obtain an account against an executor on the footing of wilful default it is necessary to allege and prove at least one instance of wilful default.[5]

Executors will be liable for loss or damage which accrues after the time they ought to have sold the property.[6] They will also be liable if they invest the money of the testator in improper or unauthorized securities,[7] or if, without great reason, they permit money to remain upon personal security longer than is absolutely necessary and loss accrues.[8] Although an executor is liable for loss occasioned by his not getting in the estate of the testator, yet if he act in the honest exercise of his discretion as to the time of selling property of a very uncertain and speculative character, he ought not to be held personally responsible for loss arising from his not having sold within twelve months.[9] In *Buxton* v. *Buxton*,[10] an executor who allowed part of a testator's assets to remain invested in Mexican bonds for a year and seven months after the testator's death, and eventually sold the bonds at a lower price than might have been obtained by a sale at an earlier period, but who appeared to have

[1] *Booth* v. *Booth*, 1 Beav., 125.

[2] *Ibid.*; see *Horton* v. *Brocklehurst* (*No.* 2), 29 Beav., 510.

[3] *Job* v. *Job*, L. R., 6 Ch. D., 562; see *In re Symons*, L. R., 21 Ch. D., 757.

[4] L. R., 6 Ch. D, 562.

[5] *Massey* v. *Massey*, 2 J. and H., 728; see *In re Bowen*, L. R., 20 Ch. D., 538.

[6] *Fry* v. *Fry*, 27 Beav., 144.

[7] See *Walker* v. *Symonds*, 3 Swan., 63; *Stickney* v. *Sewell*, 1 M. and C., 8.

[8] *Powell* v. *Evans*, 5 Ves., 839; see *Lowson* v. *Copeland*, 2 Bro. C. C., 156.

[9] *Marsden* v. *Kent*, L. R., 5 Ch. D., 598.

[10] 1 My. and C., 80.

acted throughout with diligence and good faith, was held, under the circumstances, not to be liable for the loss consequent on his not having sold them sooner. In *Grayburn* v. *Clarkson*,[1] where the the testator, who held shares in an unlimited liability company, directed his executors to convert his estate with all convenient speed, the executors were held responsible for an omission to sell within twelve months, no reason having been suggested for the delay. In *Selby* v. *Bowie*,[2] KNIGHT BRUCE, L. J., thus laid down the law on this subject: "Where an executor acts honestly, it is not every act of imprudence, nor every act of bad management, that is sufficient to charge him. There must in each case be some gross act of what the law calls wilful default—some gross and striking inattention to his duty through which loss has been sustained by those for whom he is trustee."

In dealing with the leaseholds of a testator or intestate, an executor or administrator may grant an underlease, if necessary, for the due administration of the property, but cannot give an option of purchase at a future time.[3]

If an executor improperly sells the assets at an under-value he will be responsible,[4] but if he acts *bonâ fide* in selling, he will not incur liability even where the sale is at an under-value.[5]

An executor is not justified in carrying on the trade of the testator except for the purpose of winding it up, but he may in some cases be bound to complete contracts entered into by his testator.[6] Even if the testator by his will direct that his executor should carry on his business, the executor will be personally liable for the debts incurred by him in carrying on the trade pursuant to the will, but if specific assets were directed to be employed in the business, he will be allowed to resort to such specific assets for his indemnity.[7] "It is a rule without exception," said LORD LANGDALE, M. R., in *Kirkman* v. *Booth*,[8] that to authorize executors to carry on a trade or to permit it to be carried on with the property of a testator held by them on trust, there ought to be the most distinct and positive authority and direction given by the will itself for that purpose."

[1] L. R, 3 Ch., 605.

[2] 9 Jur., N. S., 425.

[3] *Oceanic Steam Navigation Co.* v. *Sutherburry*, L. R., 16 Ch., D. (C. A.), 236. Intestate and Testamentary Succession in India, p. 312.

[4] *Rice* v. *Gordon*, 11 Beav., 265.

[5] *Selby* v. *Bowie*, 9 Jur., N. S., 425.

[6] *Collinson* v. *Lester*, 20 Beav., 356.

[7] *In re Johnson*, L. R., 15 Ch. D., 548.

[8] 11 Beav., 280; see *In re Chancellor*, L. R., 26 Ch. D., 42; *Brown* v. *Gellatley*, L. R., 2 Ch., 751; *In re Cameron*, L. R., 26 Ch. D., 19, as to the disposal of profits where a business is carried on by executors.

Executors may appoint one of their body to be their agent, and where they do so, they are to be treated exactly in the same way as if they had appointed a stranger as agent,[1] and are liable for his defaults. But where executors employ an agent to collect money under circumstances which make the employment proper, and the money collected is lost by the agent's insolvency, the burden of proof is not on the executor to show that the loss was not attributable to his own default, but on the persons seeking to charge him to prove that it was.[2] Executors will not be responsible, where, acting from necessity or according to the regular course of business, they employ an agent who misapplies money entrusted to him belonging to the estate.[3] In the case of *Bacon* v. *Bacon*,[4] an executor, who was resident in London, remitted money of the testator to an attorney in the country to pay debts due from the testator and the money was misapplied, and he was held not to be liable. But executors will be liable if they unnecessarily allow a person to receive money and that person misapplies it.[5]

[1] *Toplis* v. *Harrell*, 19 Beav., 423; *Home* v. *Pringle*, 8 Cl. and Fin., 264.

[2] *In re Brier*, L. R., 26 Ch. D., 238.

[3] *Edmunds* v. *Peak*, 7 Beav., 239; *Bacon* v. *Bacon*, 5 Ves., 334.

[4] 5 Ves., 334.

[5] *Ghost* v. *Waller*, 9 Beav., 447; see *Bostock* v. *Flower*, L. R., 1 Eq., 26.

LECTURE XII.

MAHOMEDAN LAW OF WILLS.

Mahomedan Wills sanctioned by Koran—To what extent valid—Definition—*Animus testandi* necessary—Capacity of testator—Wills of Minors whether valid—Who may be Legatees—Assent by heirs to legacies—What bequests are lawful—What may be devised—Necessity for acceptance—Revocability of Mahomedan wills—Superstitious uses—Perpetuities—Who may be Executors—Minors—Lunatics—Acceptance of executorship—Removal of executors—Powers of executors—Probate and Administration Act.

In dealing with the Hindu Law relating to wills, I pointed out that the right of testamentary disposition was not sanctioned by the ancient Hindu Law books, and I endeavoured to trace the gradual development of the practice among Hindus of making wills, until the right of testamentary devise received judicial recognition as part of the substantive law of the land throughout practically the whole of India. The Mahomedan Law of wills, on the other hand, is not the outcome of any such development. From a Mussulman's point of view a will is a divine institution expressly sanctioned by the Koran. Not only is the right of making wills sanctioned, but its exercise is regulated by the Koran. "O true believers" says the Koran "let witnesses be taken between you when death approaches any of you at the time of making the testament: let there be two witnesses from among you: or two others of a different tribe or faith from yourselves, if ye be journeying in the earth and the accident of death befall you."[1]

"Wills" says the Hedaya" are lawful on a favourable construction. Analogy would suggest that they are unlawful, because a bequest signifies an endowment with a thing in a way which occasions such endowment to be referred to a time when the property has become void in the proprietor [the testator:]—and as an endowment with reference to a future period (as if a person were to say, 'I constitute you proprietor of this article to-morrow') is unlawful, supposing even that the donor's property in the article still continues to exist at that time, it follows that the suspension of the deed to a period when the property is null and void (as at the decease of the party) is unlawful *à fortiori*. The reasons, however, for a more favourable construction in this particular are twofold. First, there is an indispensable necessity that men should have the power of making bequests, for Man, from the delusion of his hopes, is improvi-

[1] Koran, Ch V, English transl. by Sale, p. 95.

dent and deficient in practice; but when sickness invades him he becomes alarmed and afraid of death. At that period therefore he stands in need of compensating for his deficiencies by means of his property, and this in such manner, that, if he should die of such illness, his objects (namely, compensation for his deficiencies, and merit in a future state) may be obtained—or, on the other hand, if he should recover, that he may apply the said property to his wants, and as these objects are attainable by giving a legal validity to wills, they are therefore ordained to be lawful.—Secondly, wills are declared to be lawful in the Koran, and the traditions and all our doctors, moreover have concurred in this opinion."[1]

A Mussulman by will may dispose of his property to the extent of one-third of it, but a bequest exceeding that amount is not valid. A tradition, said to have been delivered by Abee Vekass, is recognized as the foundation of the restriction imposed by the Mahomedan Law upon the power of testamentary disposition possessed by Mussulmans. The Koran itself is silent as to the extent to which a Mussulman may dispose of his property by will. The tradition of Abee Vekass is as follows: "In the year of the conquest of Mecca, being taken so extremely ill that my life was dispaired of, the Prophet of God came to pay me a visit of consolation. I told him that by the blessing of God having a great estate but no heirs, except one daughter, I wished to know '*if I might dispose of it all by will.*' He replied, 'No!' and when I severally interrogated him 'if I might leave two-thirds or one-half' he also replied in the negative—but when I asked "if I might leave a third," he answered 'Yes, you may leave a third of your property by will: but a third of your property is a great portion, and it is better you should leave your heirs rich than in a state of poverty which might oblige them to beg of others.'"[2]

According to Mahomedan Law a will need not be in writing,[3] for neither the Koran nor the traditions require that a will should be written. Before the establishment of Islamism writing was very little in use among the Arabs, and in the early commentaries upon their laws, all deeds are regarded as being merely oral or nuncupative. Wills, therefore, may be either written or verbal, a written will being termed *waseutnameh* and a nuncupative will *waseut*. A will itself is defined as the "conferring a right of property in a specific thing, or in a profit or advantage in the manner of a gratuity, postponed till after the death of the testator.[4] This is the definition in the *Futwa Alumgiri*. The testator is denominated the *moosee*, the thing given or legacy, the *moosa bihee*, and the person

[1] Hedaya, IV, Bk. LII, Ch. I, Hamilton, p. 467.

[2] Quoted in Hedaya, IV, Bk. LII, Ch., I.

[3] *Ruzia Begum* v. *Aka Mahommed Ibrahim*, 1 Select Rep., 150; *Tumeez Begum* v. *Furihat Hossein*, 2 N. W. P. Rep., 155; *Aminooddowlah* v. *Roshun Ali Khan*, 5 Moore, I A., 199.

[4] Baillie, Hanif, p 623.

in whose favour the will is made, or the legatee, is demonstrated the *moosa lehoo*. The person appointed to carry the will into execution is called the *wusee*, or executor.[1]

According to Mahomedan law a devise may be made by any declaration from which the intention of the declarant is apparent to make a disposition of his property to take effect upon his death. The devise may be either to the legatee for his own benefit, or for that of some other person, or for some other purpose or object. To use the phraseology of the Mahomedan text-books, a devise is constituted by saying, "I have bequeathed such a thing *to* such an one" or "I have bequeathed *towards* such an one" or by any other expressions that are commonly used instead of those.[2] The first of the expressions used signifies that the bequest is for the legatee's own benefit, and the second (from the use of the particle *ila*) indicates that the person to whom the bequest is made is merely executor or trustee for some other person or object.

Under certain circumstances a valid bequest may be made by signs, as where a man is dumb,[3] or, where he is so sick (*mariz*) of a mortal disease as to be unable to speak, provided that his meaning can be understood and he dies without regaining his speech.[4]

A will made by a person in jest, or under compulsion or mistake, is not valid.[5] In such a case the *animus testandi* is wanting. In this respect the Mahomedan law is in accord with the English law.[6]

According to all the schools, perfect freedom (*i. e.*, from slavery) in a testator is indispensably requisite to the validity of a bequest. A slave, therefore, cannot make a will, whether he be a slave under the absolute control of his master or a *mookatib*, *i. e.*, one who has entered into an agreement with his master for his ransom or emancipation, although he may leave sufficient effects to discharge his covenanted ransom,[7] or a *mazoon*, *i. e.*, a slave who has obtained a license to work for himself.[8] A bequest by any one who is incompetent to perform a gratuitous act is invalid,[9] and the property of a *mookatib* is not fit subject of gratuitous acts.[10] A will, however, by an absolute slave, or a *mookatib*, is valid, if it is referred, as to its operation, to a time subsequent to

[1] Hedaya, Vol. IV, Bk. LII.
[2] Baillie, Hanif., 623; Door ool Mokhtar, 818.
[3] Baillie, Hanif., 652; Fut. Alum., V. p. 168.
[4] Baillie, Hanif., p. 652; Fut. Alum., Vol. VI, p 168.
[5] Baillie, Hanif., p. 627.
[6] See *supra*, p. 63.
[7] IV Hedaya, LII, Chap. I, p. 477.
[8] Baillie, Hanif., p. 627; *Ibid* Imamea, p. 232.
[9] Baillie, Hanif., p. 627.
[10] IV Hedaya, LII, Ch. I, 477.

his attaining his emancipation.[1] So if a *mookatib* after attaining his freedom assent to a will made by him previously, the will will be validated *ab initio*.[2]

A will by a person who is insane is of course void. According to the Shiah law perfect intellect is necessary to the validity of a will.[3] If a person is insane at the time of making a will, but afterwards recovers from his insanity and then dies, the will is still invalid for want of competency at the time of making it.[4]

There is a considerable difference of opinion between the schools regarding the capacity of an infant to make a testamentary disposition of his property. According to the Shiah law, the will of a youth under ten years of age is not valid,[5] but when he has attained to that age all proper bequests by him in favour of his relatives and others are lawful according to the most common and approved doctrine of that school, *if he is capable of discernment*. Some, it is said, have maintained that such bequests are valid, though he should be no more than eight years of age, but the tradition in favour of this opinion is uncommon and not well authenticated.[6] According to the Hanifi law, the will of a youth under puberty whether he be *moorohik* (that is, approaching puberty) or not, is unlawful. And it makes no difference whether the youth have been permitted to trade or been under inhibition, or whether he should die before or after puberty.[7] A will, however, executed by a minor may be confirmed or ratified on his attaining his age of majority.[8]

A bequest by an insolvent is bad, because it is said debts have a preference over bequests, as the discharge of debts is an absolute duty, whereas bequests are gratuitous and voluntary, and that which is most indispensable must be considered first. If, however, creditors relinquish their claim, the bequest is then valid, the obstacle to it being removed and the legatee being supposed to stand in need of his legacy.[9]

I now pass to a consideration of the question who may be legatees or devisees. It is one of the conditions of a valid bequest that the legatee or *moosa lehoo* shall be competent to receive it.[10] Accordingly, under Mahomedan law as well as

[1] Baillie, Hanif., p. 627.
[2] *Ibid.*, IV Hedaya, LII, Chap. I, p. 477.
[3] Baillie, Imamea, p. 232.
[4] Baillie, Hanif., p. 627.
[5] Baillie, Imam., p. 232.
[6] Baillie, Imam., p. 232.
[7] Baillie, Hanif., p. 627; see IV Hedaya, Bk. LII, p 476.
[8] *Ibid.*, 627. As to the age of majority, see Majority Act, IX of 1875.
[9] IV Hedaya LII, p. 475.
[10] Baillie, Hanif., p. 624.

under Hindu law, persons not in existence at the death of the testator are incapable of taking any bequest under a will.[1] A child, however, if born within six months from the date of the bequest is treated according to the Hanifi law as having been in existence at the time of the bequest, and a bequest to such a child is valid.[2] In other words, the child in such a case is treated as having been in existence in contemplation of law. It is necessary, however, that the child should be born alive, for if it be still-born, the bequest is void. If it be born alive, but should die immediately afterwards, the legacy descends to its heirs.[3]

According to all the schools, with the exception of the Shafeis, a bequest by a Mahomedan in favour of Zimmees, not being Hurubees, or hostile infidels, is valid.[4] A bequest to an alien living in a foreign country is void, even where the heirs consent.[5]

A bequest in favour of any of the heirs of the testator is invalid without the consent of the others. This is the law according to all the schools of Mahomedan Law. The consent must be given after the death of the testator, a consent given previously being of no effect.[6] In determining whether a person is an heir or not, regard must be had to the time of the testator's death, and not to the time of the making of the will,[7] because the efficacy of the will is established after the death of the testator.[8] The ground upon which a bequest to one or more from among the heirs is invalid is a traditional saying of the Prophet: "God has allotted to every heir his particular right." Besides, it is said, in the traditions "a bequest to particular heirs is unjust."

A bequest to a stranger is valid without the consent of the heirs, but only to the extent of a third of the testator's estate, unless they assent to it after the testator's death,[9] the third of the estate being determined at the date of the death, and not at the date of the will. A person from whom the testator had received a mortal wound, whether the wound were inflicted intentionally or accidentally is, under the Sunni law, incapable of taking a bequest,[10] because it is recorded in the traditions that "there is no legacy for a slayer," and because, the person who inflicted the wound having thereby hastened the death

[1] Baillie, Hanif., p. 624; Imam., p. 244; see *Abdul Cadur* v. *C. A. Turner*, I. L. R., 9, Bom., 158.

[2] Baillie, Hanif., p. 627; Imam., 244.

[3] Baillie, Hanif., 628; Imam., pp. 246-7.

[4] IV Hedaya, p. 473; Baillie, Hanif., p. 526; Imam., p. 244.

[5] Baillie, Hanif., p. 626.

[6] IV Hedaya, p. 470.

[7] Baillie Hanif, p. 625.

[8] IV Hedaya, p. 472.

[9] IV Hedaya, p. 468, Baillie, Hanif., p. 625; Baillie, Imam., p. 233.

[10] IV Hedaya, p. 471.

of the testator, it is considered that he should be excluded from all benefit under the will by way of punishment. According to Hanifa and Muhammad the bequest becomes valid if the heirs consent, but Aboo Yusoof is of a contrary opinion.[1] If the legatee at whose hands the testator met his death be under the age of puberty or insane, he is not excluded from the benefit intended for him, even where the heirs do not consent.[2]

The assent of heirs once given cannot be retracted, whether it be to a legacy in excess of a third of the estate, or in favour of an heir, or of the slayer of the testator. And, after the heirs have once assented, they cannot refuse to deliver up the subject of the bequest, but may be compelled to make delivery, as the title of the legatee is derived, not from them, as Shafei maintained, but from the testator himself.[3] But, although a bequest to the slayer of the testator cannot take effect without the assent of the heirs, assent is not necessary to bequests to the parents or other ancestors or the descendants of the slayer.[4]

In all cases where there is any occasion for the assent of heirs, the assent is valid only when the person who grants it is competent to grant it, as when he is of mature age and sane.[5] If some of the heirs give their consent and some withhold it, the bequest is valid only in proportion to the shares of those who consent.[6]

If an heir affix his signature to a will as a consenting party thereto, that will amount to an assent to the legacies.[7] The Court will not presume the consent of an heir even though he continue to reside in a house which has been assigned by the will. To establish an assent there must generally be evidence of an actual assent or of some act done amounting to a ratification.[8]

Acccording to the Sunni law, assent given by the heirs before the death of the testator is of no effect. It must be given after the death,[9] and, as already remarked, once given, cannot be retracted.[10] Under the Shiah law, it seems that there is a difference of opinion, but that the more common and approved opinion is, that a consent given before the death of the testator is binding upon

[1] IV Hedaya, Bk. LII, Ch. I, 471; Baillie, Hanif., p. 626.

[2] Baillie, Hanif., p. 626.

[3] IV Hedaya Bk. LII, Ch. I, p. 460; Baillie, Hanif., p. 626.

[4] Baillie, Hanif., p. 626.

[5] Baillie, Hanif., p. 625.

[6] IV Hedaya, p. 473; Baillie, Imamea, p. 233.

[7] *Khadejah Bibee* v. *Suffur Ali*, 4 W. R., 36.

[8] *Ramcoomar Chunder Roy* v. *Faqueeroonissa*, 1 Ind. Jur. O. S., 119.

[9] Baillie, Hanif., p. 625; *Nusrut Ali* v. *Zeinunnissa*, 15 W. R., 146; *Chérachour* v. *Valia* 2 Mad. H. C. R., 350.

[10] *Ibid.*, p. 626.

the heirs.[1] If a testator have no heirs, he has absolute testamentary power to dispose of his whole estate as he pleases, without the consent of the ruling power as *ultimus haeres*.[2] A bequest to a hostile or alien infidel is invalid according to all the schools,[3] as the exercise of benevolence towards such persons is forbidden in the Koran.[4]

A bequest is valid in favour of the "neighbour" of the testator, no name being mentioned, and although there is a difference of opinion, it seems that it will take effect in favour of the owner of the next adjoining house.[5]

Bequests to the following classes are lawful:

(1) relations (akraba);[6]

(2) as'har, *i. e.*, the relations of the testator by marriage;[7]

(3) "the *ahl* of such an one," *i. e.*, "the family or people of such an one;[8]

(4) the orphans, the blind, the lame, or the widows of the race (*binnee*) of such an one;[9]

(5) the children (awlad) of the race (binnee) of such an one;[10]

(6) the heirs of such an one;[11]

(7) nearest of kin;[12]

(8) beggars;[13]

(9) the holy shrine;[14]

(10) musjids.[15]

Bequests for pious purposes, as for pilgrimages, prayers and other religious duties and observances are valid.[16]

According to the Hanafi law, if a person direct by his will that his body after death should be carried to a certain place and there interred, and that a

[1] Baillie, Imam., p. 233.

[2] Baillie, Hanif., p. 625; see *Moohummud Meenoodeen Khan* v. *Moohummud Kabeeroodeen*, 4 Select Rep, 49.

[3] IV Hedaya, p. 473; Baillie, Hanif., p. 626; Baillie, Imam., p. 244.

[4] IV Hedaya, p. 473.

[5] IV Hedaya, p. 517; Baillie, Hanif., p. 660.

[6] *Ibid.*, p. 512.: Baillie, Imam., p 247.

[7] *Ibid.*, 518.

[8] *Ibid.*, 521.

[9] *Ibid.*, 522.

[10] IV Hedaya, p. 524.

[11] *Ibid.*

[12] Baillie, Hanif., Baillie, Imam., 246.

[13] Baillie, Imam., 247.

[14] Baillie, Hanif., p. 634.

[15] IV Hedaya, pp. 514-516.

[16] Baillie, Hanif., p. 633.

caravanserai is to be erected at the place, it seems that the bequest is valid as to the caravanserai but not as to the removal of the body, and that if the executor, without the consent of the heirs, should have removed the body, he is responsible for the expense incurred in so removing it.[1]

A direction to ornament the testator's tomb is void.[2] So, a direction that a testator's tomb should be plastered and a vault or arch placed over it is also unlawful, except in places where such precautions are required against the ravages of wild beasts.[3] So, also a direction that so much of one's property be given to persons for reading the Koran over the testator's grave is void.[4] If a bequest be made for good purposes (woojooh-ool-kheir) it may be expended in erecting bridges or *musjids* or for students of learning.[5] A bequest for poor Christians is good.[6]

As to the subject of a legacy it is indispensable that it be such as can lawfully be possessed or enjoyed. Accordingly, wine, pigs and other things, the traffic in which is illegal and prohibited among Mahomedans, cannot be the subject of a valid bequest.[7] Either the substance or merely the usufruct of the testator's estate or of anything belonging to it may be given, but legacies, whether of the substance or of the usufruct are restricted to one-third of the testator's estate.[8]

A bequest for what are called sinful purposes, as for the building of Jewish Synagogues or Christian Churches, or for aiding tyrants or oppressors is void.[9]

According to both the Sunni and Shiah Schools acceptance by the legatee of the legacy is necessary to complete his title.[10] An acceptance during the lifetime of the testator is of no effect according to the former school.[11] Under Shiah law if the legatee accept before the death of the testator, the acceptance is lawful or discretionary, but, if made after his death an acceptance is conclusive, even though it should have been delayed for some time after the occurrence of that event, provided that the legacy has not been rejected. According to both schools, the rejection of a legacy before the death of the testator is of no effect,

[1] *Ibid.*

[2] *Ibid.*, p. 634.

[3] Baillie, Hanif., p. 634.

[4] *Ibid.*, p. 635.

[5] *Ibid.*, p. 635.

[6] Baillie, Imam., p. 233.

[7] *Ibid.*; see Baillie, Hanif., p. 663, IV Hedaya, p. 527.

[8] Baillie, Imam., p. 231.

[9] But now see Probate and Administration Act, s. 112, under which the assent of the executor is necessary to complete the legatee's title to his legacy.

[10] IV Hedaya, p. 473.

[11] IV Hedaya, p. 473; Baillie, Imam., pp. 229, 230.

and though a legacy should have been rejected in the lifetime of the testator, it may still be accepted after his death. But, if rejected after his death without having been accepted, the legacy is cancelled, even where possession has actually taken place.[1] Under the Shiah law, if a legatee die before acceptance, his heirs are entitled to exercise their option of accepting or not,[2] but, under the Hanafi law, if a legatee dies without having declared his acceptance or refusal of a legacy, the legacy is treated as having been rejected and vests in his heirs.[3] A legatee, it seems, may, under Mahomedan law, reject portion of a bequest and accept the remainder.[4]

Under Mahomedan law, no less than under English law, a will is in its nature revocable during the lifetime of the testator,[5] and the revocation may be either express or implied. Thus, if a testator should sell the subject of the bequest, or by another will direct it to be sold, or should bestow it in gift putting the donee in possession of it, or, under Shiah law,[6][7] he should pledge it, there is a revocation. So, if he should change the nature of the subject of the bequest so that it should no longer be known by the same name, there will be a revocation of the bequest, as where there is a bequest of cloth and it is afterwards cut up and made into a garment, or of cotton which is afterwards spun into thread and woven, or of iron which is manufactured into a vessel.

According to the tenets of the Hanafi school, whatever has the effect of extinguishing the testator's property in the thing purporting to have been given by the will amounts to a revocation, but it seems that mere pledging of it, which does not extinguish his right, has not that effect.[6] It would seem that, under Hanafi law, a denial by the testator himself does not amount to a revocation of a bequest, but upon this point there is a difference of opinion between Mohamoned and Aboo Yoosuf.[7]

Objects which the English law would possibly regard as superstitious uses, are not only allowable but commendable according to Mahomedan law.[8] Under Mahomedan law a settlement is not vitiated by its involving the creation of a perpetuity, if there is an ultimate trust clearly designated in favour of charitable objects.[9]

[1] Baillie, Imam., p. 230.
[2] IV Hedaya, p. 475.
[3] Baillie, Imam., p. 230.
[4] Baillie, Hanif., p. 625; Baillie, Imam., 231.
[5] Baillie Imam., p. 231.
[6] IV Hedaya, p. 479.
[7] IV Hedaya, p. 479.
[8] *Fatma Bibee* v. *Advocate General*, I. L. R., 6 Bom., 42.
[9] *Ibid.*, *Abdul Ganne Kasam* v. *Husen Muja*, 10 Bom. H. C. R., 7; *Mahomed Hamidulla*

An executor under Mahomedan law, or *wusee* or *musa-ilehi*, as he is called, is defined to be a trustee appointed by a testator to superintend, protect and take care of his property and children after his death. It is necessary that an executor should be a Moslem. According to some Mahomedan authorities he must also be a just person. Others, however, consider this to be a redundant restriction, because, they say, all Moslems are trustworthy and may, therefore, be agents or depositories, and because the appointment rests with the testator himself. Aboo Yoosoof is reported to have said :—"To enter upon an executorship for the first time is a mistake, for the second a fraud, and for the third a theft," and in consequence of this statement it is laid down in the books that it is not advisable to accept the office of an executor.

There are three kinds of executors. Of the first are those who are capable of performing the duties committed to them, and such executors cannot be removed by the Court. The second kind are those who are weak and incapable. In their case it is said the Court should associate with them an assistant. In the third class are profligates, infidels and slaves. These are liable to be removed by the Court.[1]

A minor cannot be appointed sole executor, but he may be appointed jointly with another person not under disability, but in that case he cannot interfere with the management of the deceased's estate until he has attained the age of puberty. When two persons are appointed executors one of whom is a minor and the other an adult, the adult executor may act alone till the minor has arrived at puberty, but when that happens the adult executor can no longer act singly. If, however, the minor should die, or, on attaining puberty, prove to be of unsound mind, the other may continue to act singly, and the Judge cannot in that case force an associate on him, because there is still an executor of the deceased appointed by himself. Further, whatever may have been done by the adult executor during the minority of the other cannot be undone by the latter on his attaining puberty, unless it is contrary to the nature and object of the trust.[2]

The appointment as an executor of a person who is insane, whether he be permanently insane or has been so at intervals, is void.[3] Under the Probate and Administration Act, which applies to all Mahomedans in the territories to which the Act applies, probate cannot be granted to any person who is a minor or

Khan v. *Lotful Huq*, I. L. R., 6 Cal., 744; see *Luchmiput Singh* v. *Amir Alum*, I. L. R., 9 Cal., 176; *Fatma Bibee* v. *Aruff Ismailji*, 9 C. L. R., 66; *Amrutlal Kalidas* v. *Shaik Hussein*, I. L. R., 11 Bom., 492; *Phate Saheb Bibi* v. *Damodar Premji*, I. L. R., 3 Bom., 84.

[1] Baillie, Hanif, p 676.

[2] Baillie, Imam., 248, 9; see now sections 31 and 32 of the Probate and Administration Act.

[3] Baillie, Hanif., p. 680; see s. 33 of the Probate and Administration Act.

is of unsound mind.[1] A slave or a reprobate *(fasik)* may be appointed, but the Kazi may annul the appointment.[2] But where a slave or a reprobate has been appointed, and before the appointment has been annulled, he has interfered with the management of the estate of the deceased by selling or otherwise disposing of it, his acts will be binding upon the heirs.[3] According to both the Shiah and Sunni schools of Mahomedan Law the appointment of a *Zimmee* or non-Moslem fellow subject is valid, until set aside by the Kazi,[4] but the appointment of a non-Moslem alien is void.[5] If an alien appointed executor be converted to the faith he may continue to be executor.

A woman, when found to be in possession of the qualities and conditions requisite for the office, may be legally appointed an executrix.[6] Blindness does not render a person incapable of being an executor.[7]

Where two persons have been appointed executors in general terms, or with an express condition that they are to act jointly, one of them cannot act singly without the other, and if either of them do so, none of his acts are lawful, except such as are positively incumbent or necessary, as for instance, the providing of clothes and food for the young children of the testator.[8] According to Aboo Hanifa and Moohummud, if one of two joint executors dies, the survivor cannot dispose of the property without a reference to the Judge, who may, if he sees proper, empower him to act as sole executor, or associate another person with him. Aboo Yoosuf, on the other hand, is of opinion that he may act alone without any such reference.[9] According to the Shiah school, also, the survivor seems to have power to act alone without reference to the Judge.[10]

In cases where two persons are appointed executors, they may be compelled to act jointly, but if that is impracticable others may be appointed in place of both executors. If several persons are appointed and only one accepts the office, that one cannot lawfully carry the will into execution without bringing

[1] Act V of 1881, s. 8.

[2] IV Hedaya, p. 543.

[3] Baillie, Hanif., pp. 678-9; see *Moohummud Ameenoodeen Khan* v. *Moohummud Kabeeroodeen*, 4 Select Rep., 49, p. 53.

[4] Baillie, Hanif., p. 679; Baillie, Imam., 249; see IV Hedaya, p. 541; *Mahummud Ameenoodeen Khan* v. *Moohummud Kabeeroodeen*, 4 Select Rep., 49; *Imlach* v. *Zuhooroonisa Khanum*, 4 Select Rep., 301; *Jehan Khan* v. *Mandy*, 1 B. L. R., S. N., 16; 10 W. R., 185.

[5] Baillie, Hanif., p. 679; Baillie, Imam., p. 249.

[6] Baillie, Hanif., p. 680; Imam., 249.

[7] Baillie, Hanif., p. 680.

[8] Baillie, Imam., 242; but see ss. 9 of the Probate and Administration Act.

[9] Baillie, Hanif., p. 682.

[10] Baillie, Imam., 249, but now see ss. 11, and 93 of the Probate and Administration Act.

the matter before the Judge, who may either appoint another to act with him or authorize him to act by himself.[1]

If a person should die without appointing any executors, the superintendence and care of his estate belong to the Judge, but, if there be no Judge present, any true believer in whom confidence can be placed may lawfully assume the care and management of the estate. But on this point it is said there is room for doubt and difference of opinion.[2]

According to both the Shiah and Sunni authorities an executor may lawfully appoint his executor to be the executor of the original testator, if the original testator have given him authority to do so. Where the will of the original testator is silent on the subject, opinions differ as to whether such an appointment is valid. The Hanifites are agreed that the appointment is valid,[3] but among the followers of the other school the more approved opinion appears to be that it is invalid.[4]

Where a person is appointed executor he may either accept or decline the office, but, if he has once accepted the office in the presence of the testator, he cannot retract after the death of the testator.[5] Even during the lifetime of the testator, it would seem, he cannot withdraw his acceptance without the knowledge of the testator.[6] Acceptance may be either express or implied. Where the person appointed gives no indication of his acceptance or refusal, he is at liberty after the death of the testator to accept or refuse the appointment as he pleases. But if, under such circumstances, he should, on the death of the testator, take upon himself to deal with the estate of the testator, his acts are taken as a clear indication of his acceptance, and it becomes obligatory upon him to fulfil the duties of the office.[7] If, however, under the same circumstances, he reject the office, it is open to him afterwards to accept it, unless in the meantime the Kazi should have set his appointment aside and put another person in his place.[8]

If an executor be capable of performing the duties of the office and is trustworthy he cannot be removed from the office by the Kazi, even upon a complaint of all the heirs, unless it be shown that he has been guilty of fraud.[9] We have seen that, where an executor is merely weak or inefficient, the Judge

[1] Baillie, Hanif., p. 683.

[2] Baillie, Imam., p. 251.

[3] *Hafeezoor Rahman* v. *Khadim Hossein*, 4 N. W., H. C. R., 106.

[4] Baillie, Imam , p 253 ; Hanif., p. 684.

[5] IV Hedaya, p. 539 ; Baillie, Hanif., 676 ; Baillie, Imam., 250.

[6] *Ibid.*

[7] IV Hedaya. He is in the position of an executor *de son tort*. The provisions of the Indian Succession Act as to such an executor have not been ncorporated in the Probate and Administration Act.

[8] *Ibid.*

[9] IV Hedaya, pp 342, 343 ; Baillie, Imam., p. 250.

may associate another with him. If an executor bring his own incapacity to the notice of the Court he will not be relieved on his mere representation. But, if on inquiry he is shown to be really incompetent another person should be appointed. Profligates, infidels and slaves are all removable by the Court, though their appointments, except in the case of an alien infidel, are not actually void.

There is some difference of opinion between the Hanifis and the Shiahs as to the powers of executors. The Shiahs look upon an executor as being exactly like an agent who is strictly confined to the bounds of his commission, so that where a person has appointed an executor for the superintendence of one particular matter his power is restricted to that specific object and any other intromissions by him with the estate are unlawful.[1] Under the Sunni law, where a person appoints an executor for a particular purpose, as by saying, "I have appointed thee my executor to pay my debts," and says to another, "I have appointed thee my executor in the administration of my property," or by saying, "I have appointed such an one my executor to pay my debts and I do not appoint him for anything else, and I have appointed such another my executor for all my property," each one is executor in all matters, according to Aboo Hanifa and Aboo Yusoof, as if he had been appointed for all matters connected with the estate. But according to Moohummud each is restricted to the particular matter for which he was appointed. And, where it is made an express condition that one shall not be executor in the matter to which the other is appointed, it has been said by Moohummud Ben Alfuzl that the directions of the testator must be followed, and it is only where the testator has not made any such condition that there is the difference mentioned. The *futwa*, it is said, is with Aboo Hanifa.[2]

A testator may appoint an executor as testamentary guardian to any one over whom he had control, but he cannot nominate an executor as testamentary guardian for children who are adult and of sound understanding.[3] A person having the superintendence of the property of an orphan is entitled to take from its estate the ordinary hire or recompence due for his trouble, but some doctors are of opinion that he is limited to what may be sufficient for his expenses.[4]

In dealing with the powers of executors under wills of Mahomedans, it must be borne in mind that chapters XII to XIII the Probate and Administration Act, 1881, apply to the wills of all Mahomedans in the territories to which that Act is applicable.[5] Accordingly, in these territories, all the powers conferred by that Act must be taken to belong to the executors of Mahomedan wills, and their

[1] Baillie, Imam., 257.

[2] Baillie, Hanif., p. 682.

[3] Baillie, Imam., p. 251.

[4] *Ibid.*, p. 252.

[5] As to the territories in which the Act applies see pp. 322, 323, 325, 325, 327, *supra*.

powers must be determined, not by Mahomedan law, but by the provisions of the Act.[1] Under the Mahomedan law, an executor is entitled to take possession of the portions of infant and absent adult heirs on their behalf, but not of the legacies of infant or absent legatees.[2] Under s. 4 of the Probate and Administration Act, the excutor is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

In the main, the rules of the Mahomedan law which govern the powers of executors are not inconsistent with the rules which the legislature has applied to them by the Probate and Administration Act, but there are a few differences to which it may be well to draw attention.

Under the Mahomedan law an executor is responsible if he pay a debt without proof, but he is not responsible for the loss or destruction of the deceased's estate, unless it is occasioned by his departure from the conditions or rules of his office or by some personal neglect.[3] The Mahomedan law expressly declares that it is unlawful for an executor to trade with the property of an orphan, for it is said that the conservation of it, not the power of trading with it, was committed to him.[4] So, an executor cannot lawfully give a long lease of part of the deceased's property for the payment of debts or lend out a minor's property.[5]

The executor of a father may effect a partition of the property for young children whether the property be moveable or immoveable, the principle being that having the power to sell he has power to make a partition.[6] Thus, where all the heirs are minors, and the executor has made partition with a legatee, giving him his third, and holding the two-thirds for the heirs, the partition is lawful, so that, if what he so holds should perish while in his possession, the heirs have no recourse against the legatee nor against the executor for the loss,[7] unless, indeed, the executor has been guilty of negligence.

If some of the heirs are adult and absent, the executor may make a partition on their behalf with the legatee in everything except immoveable property. If an executor should make a partition to, or in favour of, heirs when there are legacies, and the legatees are absent, the partition is not lawful and the legatees might still claim to be a partners with the heirs to the extent of a third of what remains, if the portion allotted to him should perish.[8]

[1] See *Shaik Moosa* v. *Shaik Essa*, I. L. R., 8 Bom. 241, p. 256.

[2] IV Hedaya, pp. 548, 549.

[3] Baillie, Hanif., p. 690; Baillie, Imam., p. 250; see Indian Succession Act, s. 146.

[4] IV Hedaya, p. 554.

[5] Baillie, Hanif., p. 691.

[6] Baillie. Hanif., p. 685.

[7] *Ibid.*

[8] *Ibid.*, 685; see now ss. 112 and 113 of the Probate Act as to the assent of an executor to a legacy and its effect.

The executor of a mother may validly make a partition on account of minor children of moveable property inherited from her, when they have no father nor father's executor, but not otherwise. So it is with the executor of a brother or paternal uncle.[1] An executor cannot make a partition among heirs where they are all minors. If they are all adults, but some of them are absent, the partition is lawful as to chattels, but not as to moveable property. If there are both minor and adult heirs, but the adults are not present, the partition is unlawful, but if the adults are present and the shares of the minors separated in a mass without partition among the individual minors, the partition is valid.[2]

The following extract gives the provisions of the Mahomedan law with regard to an executor's powers to sell the property of his testator: "When a father's executor has sold anything belonging to the estate of the father, the case presents two aspects. The first is when the deceased has left neither debts nor legacies; the second is when he has left one or other of these. With regard to the first, it is said in the book that the executor may sell the whole property, moveable and immoveable, when the heirs are minors. But Hulwaee has said that this was the opinion of the ancients, and that, according to the moderns, the *akár*, or immoveable property, of a minor can be sold only (that is, when there are no debts nor general legacies), if the minor has occasion for the price of it, or a purchaser is eager to obtain it by giving double its value, or the sale is otherwise for the minors' advantage, as, for instance, when the *khuraj*, or land-tax, and expenses exceed its income; or the property, being shops or a mansion, is falling to decay. With regard to the land-tax, when a necessity arises for paying it, and there is belonging to the estate any other property besides *akár*, the other property is first to be applied to its payment; and if that is not sufficient, the *akár* may then be sold for its value, or a price not much less than its value; but the executor cannot lawfully sell it at a greater depreciation than men would usually submit to. And, in like manner, an executor cannot lawfully purchase for a minor anything at a price much above its value. When the heirs are all adult and present, the executor can sell no part of the estate except by their directions, and if they are absent, he cannot lawfully sell the *akár*, though he may sell anything but the *akár* (and let the whole to hire), because he has the power of conservation over the property of an absentee, and it may be necessary to sell chattels in order to preserve them; but *akár*, or immoveable property, is secure in itself, except in the case of its falling into decay, and in that case it also may be sold. When all the heirs are adult, and one of them is absent while the others are present, the executor may sell the share of the absentee, in all that is not *akár*, for the sake of preserving it, ac-

[1] Baillie., Hanif., p. 686.

[2] *Ibid.*

cording to all opinions, and the shares of those who are present also, according to Aboo Hanifa; but according to both his companions, the sale of their shares is unlawful. In all that has been said, it is assumed that there are no debts nor legacies. But if there are debts, and they cover the whole of the estate, the executor may sell the whole by general agreement; and when the debts do not cover the whole estate, he may sell as much of it as may be necessary for their payment. He may also sell the surplus, according to Aboo Hanifa; but this was contrary to the opinion of his companions. When, however, an executor has actually sold *akár*, or immoveable property, for the payment of debts, while he has other property in his hands sufficient for that purpose, the sale is lawful. And if there are general legacies, the executor may sell as much of the property as may be necessary for their liquidation (not exceeding, of course a third of the whole after payment of the debts). And if there be among the heirs one minor, and all the rest are adults, and neither debts nor legacies, the estate consisting entirely of chattels, the executor may sell the share of the minor, according to all, and the shares of the others, according to Aboo Hanifa; so that if he should sell the whole, the sale would be lawful according to him, but it would not be lawful according to the other two, as to the shares of the adults; the principle of the former being that, whenever the executor has power to sell a part of the estate, he has power to sell the whole. * * * * With regard to the executor of a mother or a brother,—when a mother has died leaving property and a minor son and having appointed an executor, or a brother has died leaving property and a minor brother, and having appointed an executor, the executor may lawfully sell anything but *akár* belonging to the estate of the deceased, but can neither sell the *akár*, nor lawfully buy anything for the minor but food and clothing, which are necessary for his preservation. The executor of a mother has no power to sell anything that a minor has inherited from his father, whether moveable or immoveable, and whether the property be involved in debt or free from it. But what he has inherited from herself when it is free from debts and legacies, the executor may sell what is moveable but he cannot sell *akár*. If the estate is involved in debt or legacies, and the debt is such as to absorb the whole, he may sell the whole, the sale of *akár* coming within his power; and if the debt does not absorb the whole, he may sell as much of it as is necessary to defray the debts, and, as to this power to sell the surplus, there is the same difference of opinion as has been stated above. If all the heirs are adult and present, the estate being free from debt, the mother's executor can sell no part of her estate; and if the estate is in debt, the answer to be given as to the power of the mother's executor is like that in the case of the father's executor; both in respect of matters in which opinions agree and in which they differ. And if there are both adult and minor heirs, and the adult are absent, the

estate being free from debt, the mother's executor may sell what is moveable of her estate, whether it belongs to the share of the minor or the adult, but cannot sell the *akár* of her estate, the shares of minors and adults being in this case the same. And if the estate be involved in debt the answer to be given as to the power of the mother's executor is like the answer in the case of the father's executor. If the adults are present and the estate free from debt, the executor may sell the minor's share of her moveable estate; but whether he can sell the share of the adults, opinions differ; while he certainly cannot sell the *akár*. And if the estate be involved in debts or legacies, and the debts absorb the whole, he may sell the whole, and if they do not he may sell the moveable and as much of the *akár* as may be necessary for the payment of debts, and as to the surplus there is the difference among 'our shaikhs' already mentioned. Whatever has been said as to the executor of the mother is true of the executor of the brother, and the paternal uncle; the principle being that the power of the executor is measured by the power of his testator."[1]

The powers of a Mahomedan executor, under the Probate and Administration Act, in disposing of the estate of his testator are laid down by s. 90 of that Act, as amended by Act VI of 1889, s. 14.

A pledge for his own debt by an executor of the property of a minor is said to be lawful on a liberal construction of the law, but it is not lawful for an executor to pay his own debt with the property of a minor under his charge as executor.[2] According to Moohummud and Aboo Yoosuf a sale of the minor's property to the executor himself is unlawful under any circumstances, but according to Aboo Hanifa it is only lawful where it is obviously for the benefit of the minor.[3] Now under s. 91 of the Probate and Administration Act, we have seen, if an executor purchases directly or indirectly any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold. A sale effected by an executor of the property of one of his minor wards to the other is also unlawful.[4]

The Mahomedan law itself contains no rules as to grants of probate, but now under Chapters II to IV of the Probate and Administration Act elaborate provisions relating to the grant, alteration and revocation of probates have been applied in the case of the wills of all Mahomedans to whom the Act is applicable. Chapter VII of the same Act deals with the duties of executors; Chapters VIII, IX and X with the assent to legacies by executors, the payment and apportionment of annuities and the investment of funds to provide for legacies; Chapters XI and XII contain provisions as to the produce and interest of

[1] Baillie, Hanif., pp. 687-9.
[2] Baillie., Hanif., p. 692.
[3] *Ibid.*, 692.
[4] *Ibid.*, 692.

legacies and the refunding of legacies, and Chapter XIII makes executors liable for devastation in certain cases. The provisions of these Chapters of the Act have all been already dealt with, and it is unnecessary to do more now than refer, as I have done, to their application to executors under the wills of Mahomedan testators.

In the case of *Shaik Moosa* v. *Shaik Essa*,[1] it was said that since the passing of the Probate and Administration Act, the powers of Mahomedan executors, in cases in which that Act applies, are no longer determined by Mahomedan law but by the provisions of that Act.[2]

[1] I. L. R. 8 Bom., p. 256.

[2] As to territories where that Act applies, see pp. 322, 323, 325, 326, 327, *supra*.

APPENDIX.

THE

INDIAN SUCCESSION ACT

BEING

ACT X OF 1865.

(*Received the assent of the Governor-General on the* 16*th March*, 1865.)

An Act to amend and define the Law of Intestate and Testamentary Succession in British India.

WHEREAS it is expedient to amend and define the rules of law applicable to Intestate and Testamentary Succession in British India; it is enacted as follows:—

PART I.

PRELIMINARY.

1. This Act may be cited as "The Indian Succession Act, 1865."

2. Except as provided by this Act or by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of Intestate or Testamentary Succession.

3. In this Act, unless there be something repugnant in the subject or context,—

Words importing the singular number include the plural: words importing the plural number include the singular; and words importing the male sex include females.

'Person' includes any Company or Association, or body of persons, whether incorporated or not.

'Year' and 'month' respectively mean a year and month reckoned according to the British calendar.

'Immoveable property' includes land, incorporeal tenements and things attached to the earth, or permanently fastened to anything which is attached to the earth.

'Moveable property' means property of every description except immoveable property.

'Province' includes any division of British India having a Court of the last resort.

'British India' means the territories which are or may become vested in Her Majesty or her successors by the Statute 21 & 22 Vict., c. 106, other than the Settlement of Prince of Wales' Island, Singapore, and Malacca.

'District Judge' means the Judge of a principal Civil Court of original jurisdiction.

'Minor' means any person who shall not have completed the age of eighteen years, and 'minority' means the status of such person.

'Will' means the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death.

'Codicil' means an instrument made in relation to a will, and explaining, altering, or adding to its dispositions. It is considered as forming an additional part of the will.

'Probate' means the copy of a will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator.

'Executor' means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided.

'Administrator' means a person appointed by competent authority to administer the estate of a deceased person when there is no executor.

And in every part of British India to which this Act shall extend, 'Local Government' shall mean the person authorized by law to administer Executive Government in such part; and 'High Court' shall mean the highest civil court of appeal therein [and, for the purposes of ss. 242, 242*a* and 277*a*, shall include the Court of the Recorder of Rangoon].

The words within brackets have been added by s. 1 of Act XIII of 1875.

4. No person shall, by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.

PART II.*

OF DOMICILE.

5. Succession to the immoveable property in British India of a person deceased is regulated by the law of British India, wherever he may have had his domicile at the time of his death. Succession to the moveable property of a person deceased is regulated by the law of the country in which he had his domicile at the time of his death.

Illustrations.

(*a.*) A, having his domicile in British India, dies in France, leaving moveable property in France, moveable property in England, and property, both moveable and immoveable, in British India The succession to the whole is regulated by the law of British India.

(*b.*) A, an Englishman having his domicile in France, dies in British India, and leaves property, both moveable and immoveable, in British India. The succession to the moveable property is regulated by the rules which govern in France, the succession to the moveable property of an Englishman dying domiciled in France, and the succession to the immoveable property is regulated by the law of British India.

6 A person can only have one domicile for the purpose of succession to his moveable property.

7. The domicile of origin of every person of legitimate birth is in the country in which, at the time of his birth, his father was domiciled; or, if he is a posthumous child, in the country in which his father was domiciled at the time of his father's death.

Illustration.

At the time of the birth of A, his father was domiciled in England. A's domicile of origin is in England, whatever may be the country in which he was born.

8. The domicile of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled.

9. The domicile of origin prevails until a new domicile has been acquired.

10. A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.

Explanation.—A man is not to be considered as having taken up his fixed habitation in British India merely by reason of his residing there in Her Majesty's Civil or Military Service, or in the exercise of any profession or calling.

Illustrations.

(*a.*) A, whose domicile of origin is in England, proceeds to British India, where he settles as a Barrister or a Merchant, intending to reside there during the remainder of his life. His domicile is now in British India

(*b.*) A, whose domicile is in England, goes to Austria and enters the Austrian service, intending to remain in that service. A has acquired a domicile in Austria.

(*c.*) A, whose domicile of origin is in France, comes to reside in British India under an engagement with the British Indian Government for a certain number of years. It is his intention to return to France at the end of that period. He does not acquire a domicile in British India.

(*d.*) A, whose domicile is in England, goes to reside in British India for the purpose of winding up the affairs of a partnership, which has been dissolved, and with the intention of returning to England as soon as that purpose is accomplished. He does not by such residence acquire a domicile in British India, however long the residence may last.

* This Part does not apply to Hindus—Hindu Wills Act, XXI of 1870.

(*e.*) A, having gone to reside in British India under the circumstances mentioned in the last preceding illustration, afterwards alters his intention, and takes up his fixed habitation in British India. A has acquired a domicile in British India.

(*f.*) A, whose domicile is in the French Settlement of Chandernagore, is compelled by political events to take refuge in Calcutta, and resides in Calcutta for many years in the hope of such political changes as may enable him to return with safety to Chandernagore. He does not by such residence acquire a domicile in British India.

(*g.*) A, having come to Calcutta under the circumstances stated in the last preceding illustration, continues to reside there after such political changes have occurred as would enable him to return with safety to Chandernagore, and he intends that his residence in Calcutta shall be permanent. A has acquired a domicile in British India.

11. Any person may acquire a domicile in British India by making and depositing in some office in British India (to be fixed by the Local Government), a declaration in writing under his hand of his desire to acquire such domicile, provided that he shall have been resident in British India for one year immediately preceding the time of his making such declaration.

12. A person who is appointed by the Government of one country to be its ambassador, consul, or other representative in another country, does not acquire a domicile in the latter country by reason only of residing there in pursuance of his appointment; nor does any other person acquire such domicile by reason only of residing with him as part of his family or as a servant.

13. A new domicile continues until the former domicile has been resumed or another has been acquired.

14. The domicile of a minor follows the domicile of the parent from whom he derived his domicile of origin.

Exception.—The domicile of a minor does not change with that of his parent, if the minor is married or holds any office or employment in the service of Her Majesty, or has set up with the consent of the parent in any distinct business.

15. By marriage a woman acquires the domicile of her husband, if she had not the same domicile before.

16. The wife's domicile during the marriage follows the domicile of her husband.

Exception.—The wife's domicile no longer follows that of her husband, if they be separated by the sentence of a competent Court, or if the husband is undergoing a sentence of transportation.

17. Except in the cases above provided for, a person cannot, during minority, acquire a new domicile.

18. An insane person cannot acquire a new domicile in any other way than by his domicile following the domicile of another person.

19. If a man dies leaving moveable property in British India, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of British India.

PART III.*

OF CONSANGUINITY.

20. Kindred or consanguinity is the connexion or relation of persons descended from the same stock or common ancestor.

21. Lineal consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather, and great grandfather, and so upwards in the direct ascending line; or between a man, his son, grandson, great grandson, and so downwards in the direct descending line. Every generation constitutes a degree, either ascending or descending. A man's father is related to him in the first degree, and so likewise is his son; his grandfather and grandson in the second degree; his great grandfather and great grandson in the third.

22. Collateral consanguinity is that which subsists between two persons, who are descended from the same stock or ancestor, but neither of whom is descended in a direct line from the other. For the purpose of ascertaining in what degree of kindred any collateral relative stands to a person deceased, it is proper to reckon upwards from the person deceased to the common stock, and then downwards to the collateral relative, allowing a degree for each person, both ascending and descending.

23. For the purpose of succession, there is no distinction between those who are related to a person deceased through his father and those who are related to him through his mother;

* This Part does not apply to Parsees (Act XXI of 1865, s. 8); nor to Hindus, etc. (Act XXI of 1870)

nor between those who are related to him by the full blood, and those who are related to him by the half blood; nor between those who were actually born in his lifetime, and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive.

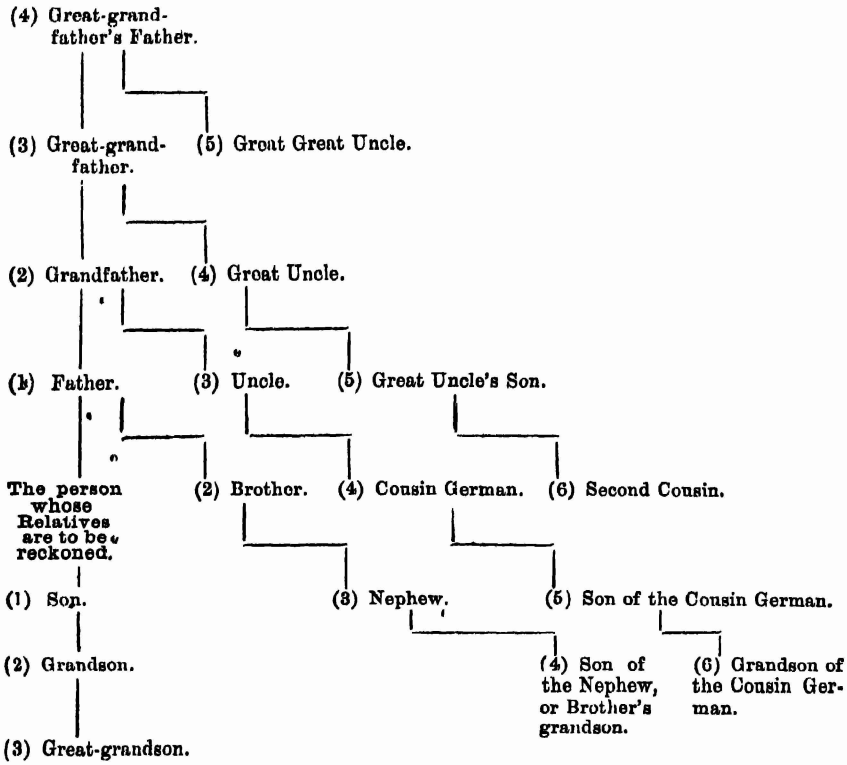
24. In the annexed table of kindred, the degrees are computed as far as the sixth, and are marked by numeral figures.

The person whose relatives are to be reckoned, and his cousin german, or first cousin, are, as shown in the table, related in the fourth degree; there being one degree of ascent to the father, and another to the common ancestor, the grandfather; and from him one of descent to the uncle, and another to the cousin-german; making in all four degrees.

A grandson of the brother and a son of the uncle, *i. e.*, a great nephew and a cousin-german, are in equal degree, being each four degrees removed.

A grandson of a cousin-german is in the same degree as the grandson of a great uncle, for they are both in the sixth degree of kindred.

Table of Consanguinity.



PART IV.*

OF INTESTACY.

25. A man is considered to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

* This Part does not apply to Hindus, etc. (Act XXI of 1870); nor does it, with the exception of s. 25, apply to Parsees (Act XXI of 1865, s. 8).

Illustrations.

(*a.*) A has left no will. He has died intestate in respect of the whole of his property.

(*b.*) A has left a will, whereby he has appointed B his executor, but the will contains no other provisions. A has died intestate in respect of the distribution of his property.

(*c.*) A has bequeathed his whole property for an illegal purpose. A has died intestate in respect of the distribution of his property.

(*d.*) A has bequeathed £1,000 to B, and £1,000 to the eldest son of C, and has made no other bequest, and has died leaving the sum of £2,000 and no other property. C died before A without having ever had a son. A has died intestate in respect of the distribution of £1,000.

26. Such property devolves upon the wife or husband, or upon those who are of the kindred of the deceased, in the order and according to the rules herein prescribed.

Explanation—The widow is not entitled to the provision hereby made for her, if by a valid contract made before her marriage she has been excluded from her distributive share of her husband's estate.

27. Where the intestate has left a widow, if he has also left any lineal descendants, one-third of his property shall belong to his widow, and the remaining two-thirds shall go to his lineal descendants, according to the rules herein contained. If he has left no lineal descendants, but has left persons who are of kindred to him, one-half of his property shall belong to his widow, and the other half shall go to those who are of kindred to him, in the order and according to the rules herein contained. If he has left none who are of kindred to him, the whole of his property shall belong to his widow.

28. Where the intestate has left no widow, his property shall go to his lineal descendants or to those who are of kindred to him not being lineal descendants, according to the rules herein contained; and if he has left none who are of kindred to him, it shall go to the Crown.

PART V.*

OF THE DISTRIBUTION OF AN INTESTATE'S PROPERTY.

(*a*) *Where he has left lineal descendants.*

29. The rules for the distribution of the intestate's property after deducting the widow's share (if he has left a widow) amongst his lineal descendants, are as follows:—

30. Where the intestate has left surviving him a child or children, but no more remote lineal descendant through a deceased child, the property shall belong to his surviving child, if there be only one, or shall be equally divided among all his surviving children.

31. Where the intestate has not left surviving him any child, but has left a grandchild or grandchildren, and no more remote descendant through a deceased grandchild, the property shall belong to his surviving grandchild, if there be only one, or shall be equally divided among all his surviving grandchildren.

Illustrations.

(*a.*) A has three children, and no more: John, Mary, and Henry. They all die before the father: John leaving two children, Mary three, and Henry four. Afterwards A dies intestate, leaving those nine grandchildren and no descendant of any deceased grandchild. Each of his grandchildren shall have one-ninth.

(*b.*) But if Henry has died leaving no child, then the whole is equally divided between the intestate's five grandchildren, the children of John and Mary.

(*c.*) A has two children and no more: John and Mary. John dies before his father, leaving his wife pregnant. Then A dies, leaving Mary surviving him, and in due time a child of John is born. A's property is to be equally divided between Mary and such posthumous child.

32. In like manner, the property shall go to the surviving lineal descendants who are nearest in degree to the intestate, where they are all in the degree of great grandchildren to him, or are all in a more remote degree.

33. If the intestate has left lineal descendants who do not all stand in the same degree of kindred to him, and the persons through whom the more remote are descended from him are dead, the property shall be divided into such a number of equal shares as may correspond with the number of the lineal descendants of the intestate who either stood in the nearest

* This Part does not apply to Parsees (Act XXI of 1865, s. 8); nor to Hindus, etc. (Act XXI of 1870).

degree of kindred to him at his decease, or, having been of the like degree of kindred to him, died before him leaving lineal descendants who survived him; and one of such shares shall be allotted to each of the lineal descendants who stood in the nearest degree of kindred to the intestate at his decease; and one such share shall be allotted in respect of each of such deceased lineal descendants; and the share allotted in respect of each of such deceased lineal descendants shall belong to his surviving child or children or more remote lineal descendants, as the case may be; such surviving child or children or more remote lineal descendants always taking the share which his or their parent or parents would have been entitled to respectively if such parent or parents had survived the intestate.

Illustrations.

(*a.*) A had three children—John, Mary, and Henry; John died, leaving four children, and Mary died, leaving one, and Henry alone survived the father. On the death of A intestate, one-third is allotted to Henry, one-third to John's four children, and the remaining third to Mary's one child.

(*b.*) A left no child, but left eight grandchildren, and two children of a deceased grandchild. The property is divided into nine parts, one of which is allotted to each grandchild; and the remaining one-ninth is equally divided between the two great grandchildren.

(*c.*) A has three children—John, Mary, and Henry; John dies leaving four children, and one of John's children dies leaving two children. Mary dies leaving one child. A afterwards dies intestate. One-third of his property is allotted to Henry; one-third to Mary's child; and one-third is divided into four parts, one of which is allotted to each of John's three surviving children, and the remaining part is equally divided between John's two grandchildren.

(*b*) *Where the Intestate has left no lineal descendants.*

34. Where an intestate has left no lineal descendants, the rules for the distribution of his property (after deducting the widow's share, if he has left a widow) are as follows.

35. If the intestate's father be living, he shall succeed to the property.

36. If the intestate's father is dead, but the intestate's mother is living, and there are also brothers or sisters of the intestate living, and there is no child living of any deceased brother or sister, the mother and each living brother or sister shall succeed to the property in equal shares.

Illustration.

A dies intestate, survived by his mother and two brothers of the full blood, John and Henry, and a sister Mary, who is the daughter of his mother, but not of his father. The mother takes one-forth, each brother takes one-fourth, and Mary, the sister of half-blood, takes one-fourth.

37. If the intestate's father is dead, but the intestate's mother is living, and if any brother or sister, and the child or children of any brother or sister who may have died in the intestate's life-time are also living, then the mother and each living brother or sister, and the living child or children of each deceased brother or sister, shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Illustration.

A, the intestate, leaves his mother, his brothers John and Henry, and also one child of a deceased sister, Mary, and two children of George, a deceased brother of the half blood, who was the son of his father but not of his mother. The mother takes one-fifth, John and Henry each take one-fifth, the child of Mary takes one-fifth, and the two children of George divide the remaining one-fifth equally between them.

38. If the intestate's father is dead, but the intestate's mother is living, and the brothers and sisters are all dead, but all or any of them have left children who survived the intestate, the mother and the child or children of each deceased brother or sister shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the share which their respective parents would have taken if living at the intestate's death.

Illustration.

A, the intestate, leaves no brother or sister, but leaves his mother and one child of a deceased sister Mary, and two children of a deceased brother George. The mother takes one-third, the child of Mary takes one-third, and the children of George divide the remaining one-third equally between them.

39. If the intestate's father is dead, but the intestate's mother is living, and there is

neither brother, nor sister, nor child of any brother or sister of the intestate, the property shall belong to the mother.

40. Where the intestate has left neither lineal descendant, nor father, nor mother, the property is divided equally between his brothers and sisters and the child or children of such of them as may have died before him, such children (if more than one) taking in equal shares only the share which their respective parents would have taken if living at the intestate's death.

41. If the intestate left neither lineal descendant, nor parent, nor brother, nor sister, his property shall be divided equally among those of his relatives who are in the nearest degree of kindred to him.

Illustrations.

(*a.*) A, the intestate, has left a grandfather and a grandmother, and no other relative standing in the same or a nearer degree of kindred to him. They, being in the second degree, will be entitled to the property in equal shares, exclusive of any uncle or aunt of the intestate, uncles and aunts being only in the third degree.

(*b.*) A, the intestate, has left a great grandfather or great grandmother, and uncles and aunts, and no other relative standing in the same or a nearer degree of kindred to him. All of these being in the third degree, shall take equal shares.

(*c.*) A, the intestate, left a great grandfather, an uncle, and a nephew, but no relative standing in a nearer degree of kindred to him. All of these being in the third degree, shall take equal shares.

(*d.*) Ten children of one brother or sister of the intestate, and one child of another brother or sister of the intestate, constitute the class of relatives of the nearest degree of kindred to him. They shall each take one-eleventh of the property.

42. Where a distributive share in the property of a person who has died intestate shall be claimed by a child, or any descendant of a child of such person, no money or other property which the intestate may, during his life, have paid, given, or settled to or for the advancement of the child by whom or by whose descendant the claim is made, shall be taken into account in estimating such distributive share.

PART VI.*

OF THE EFFECT OF MARRIAGE AND MARRIAGE SETTLEMENTS ON PROPERTY.

43. The husband surviving his wife has the same rights in respect of her property, if she die intestate, as the widow has in respect of her husband's property, if he die intestate.

44. If a person whose domicile is not in British India marries in British India a person whose domicile is in British India, neither party acquires, by the marriage, any rights in respect of any property of the other party not comprised in a settlement made previous to marriage, which he or she would not acquire thereby if both were domiciled in British India at the time of the marriage.

45. The property of a minor may be settled in contemplation of marriage, provided the settlement be made by the minor with the approbation of the minor's father, or if he be dead or absent from British India, with the approbation of the High Court.

PART VII.†

OF WILLS AND CODICILS.

46. Every person of sound mind and not a minor may dispose of his property by will.

This section applies to Hindus etc.

Explanation 1.—A married woman may dispose by will of any property which she could alienate by her own act during her life.

Explanation 2.—Persons who are deaf, or dumb, or blind, are not thereby incapacitated for making a will if they are able to know what they do by it.

Explanation 3.—One who is ordinarily insane may make a will during an interval in which he is of sound mind.

Explanation 4.—No person can make a will while he is in such a state of mind, whether

* This Part does not apply to Hindus, etc. (Hindu Wills Act, XXI of 1870). With the exception of s. 43, it applies to Parsees (Act XXI of 1865, s. 8).

† Of this Part, ss. 46, 48, and 49 apply to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay, under Act XXI of 1870.

arising from drunkenness, or from illness, or from any other cause, that he does not know what he is doing.

Illustrations.

(*a.*) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him, or in whose favour it would be proper that he should make his will. A cannot make a valid will.

(*b.*) A executes an instrument purporting to be his will, but he does not understand the nature of the instrument or the effect of its provisions. This instrument is not a valid will.

(*c.*) A being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property, makes his will. This is a valid will.

See *ante* pp. 55, 74, 75, 80, 81, 82.

47. A father, whatever his age may be, may, by will, appoint a guardian or guardians for his child during minority.

This section does not apply to Hindus etc.

See *ante* pp. 80—81.

48. A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

This section applies to Hindus etc.

Illustrations.

(*a.*) A falsely and knowingly represents to the testator that the testator's only child is dead, or that he has done some undutiful act, and thereby induces the testator to make a will in his (A's) favour. Such will has been obtained by fraud, and is invalid.

(*b.*) A by fraud and deception prevails upon the testator to bequeath a legacy to him. The bequest is void.

(*c.*) A, being a prisoner by lawful authority, makes his will. The will is not invalid by reason of the imprisonment.

(*d.*) A threatens to shoot B, or to burn his house, or to cause him to be arrested on a criminal charge, unless he makes a bequest in favour of C. B, in consequence, makes a bequest in favour of C. The bequest is void, the making of it having been caused by coercion.

(*e.*) A being of sufficient intellect, if undisturbed by the influence of others, to make a will, yet being so much under the control of B that he is not a free agent, makes a will dictated by B. It appears that he would not have executed the will but for fear of B. The will is invalid.

(*f.*) A, being in so feeble a state of health as to be unable to resist importunity, is pressed by B to make a will of a certain purport, and does so merely to purchase peace, and in submission to B. The will is invalid.

(*g.*) A being in such a state of health as to be capable of exercising his own judgment and volition, B uses urgent intercession and persuasion with him to induce him to make a will of a certain purport. A, in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition, makes his will in the manner recommended by B. The will is not rendered invalid by the intercession and persuasion of B.

(*h.*) A with a view to obtaining a legacy from B, pays him attention and flatters him, and thereby produces in him a capricious partiality to A. B, in consequence of such attention and flattery, makes his will, by which he leaves a legacy to A. The bequest is not rendered invalid by the attention and flattery of A.

See *ante* pp. 83—84.

49. A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will.

This section applies to Hindus etc.

PART VIII.*

OF THE EXECUTION OF UNPRIVILEGED WILLS.

50. Every testator, not being a soldier employed in an expedition, or engaged in actual warfare, or a mariner at sea, must execute his will according to the following rules:—

First.—The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

Second.—The signature or mark of the testator, or the signature of the person signing for

* This part applies to Hindus etc.

him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

Third.—The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

See *ante* pp. 96—97.

51. If a testator, in a will or codicil duly attested, refers to any other document then actually written, as expressing any part of his intentions, such document shall be considered as forming a part of the will or codicil in which it is referred to.

See *ante* pp. 66—70.

PART IX.*

OF PRIVILEGED WILLS.

52. Any soldier being employed in an expedition, or engaged in actual warfare, or any mariner being at sea, may, if he has completed the age of eighteen years, dispose of his property by a will made as is mentioned in the fifty-third section. Such wills are called privileged wills.

Illustrations.

(*a.*) A, the surgeon of a regiment, is actually employed in an expedition. He is a soldier actually employed in an expedition, and can make a privileged will.

(*b.*) A is at sea in a merchant-ship, of which he is the purser. He is a mariner, and being at sea can make a privileged will.

(*c.*) A, a soldier serving in the in the field against insurgents, is a soldier engaged in actual warfare, and as such can make a privileged will.

(*d.*) A, a mariner of a ship in the course of a voyage, is temporarily on shore while she is lying in harbour. He is, in the sense of the words used in this clause, a mariner at sea, and can make a privileged will.

(*e.*) A, an admiral who commands a naval force, but who lives on shore, and only occasionally goes on board his ship, is not considered as at sea, and cannot make a privileged will.

(*f.*) A, a mariner, serving on a military expedition, but not being at sea, is considered as a soldier, and can make a privileged will.

53. Privileged wills may be in writing, or may be made by word of mouth.

The execution of them shall be governed by the following rules:—

First.—The will may be written wholly by the testator, with his own hand. In such case it need not be signed nor attested.

Second.—It may be written wholly or in part by another person, and signed by the testator. In such case it need not be attested.

Third.—If the instrument purporting to be a will is written wholly or in part by another person, and is not signed by the testator, it shall be considered to be his will, if it be shown that it was written by the testator's directions, or that he recognized it as his will.

If it appear on the face of the instrument, that the execution of it in the manner intended by him was not completed, the instrument shall not by reason of that circumstance be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument.

Fourth.—If the soldier or mariner shall have written instructions for the preparation of his will, but shall have died before it could be prepared and executed, such instructions shall be considered to constitute his will.

Fifth.—If the soldier or mariner shall, in the presence of two witnesses, have given verbal instructions for the preparation of his will, and they shall have been reduced into writing in his lifetime, but he shall have died before the instrument could be prepared and executed, such instructions shall be considered to constitute his will, although they may not have been reduced into writing in his presence, nor read over to him.

Sixth.—Such soldier or mariner as aforesaid may make a will by word of mouth by declaring his intentions before two witnesses present at the same time.

Seventh.—A will made by word of mouth shall be null at the expiration of one month after the testator shall have ceased to be entitled to make a privileged will.

* This part does not apply to Hindus etc. See *ante* pp. 103—105.

PART X.

OF THE ATTESTATION, REVOCATION, ALTERATION AND REVIVAL OF WILLS.

54. A will shall not be considered as insufficiently attested by reason of any benefit thereby given, either by way of bequest or by way of appointment, to any person attesting it, or to his or her wife or husband :

but the bequest or appointment shall be void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them.

Explanation.—A legatee under a will does not lose his legacy by attesting a codicil which confirms the will.*

See pp. 99, 238.

55. No person, by reason of interest in, or of his being an executor of, a will, is disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.

This section does not apply to Hindus etc.

56. Every will shall be revoked by the marriage of the maker, except a will made in exercise of a power of appointment, when the property over which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator, or to the person entitled in case of intestacy.

Explanation.—Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property.

This section applies to Hindus etc.

See pp. 105, 195.

57. No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Illustrations.

(*a.*) A has made an unprivileged will. Afterwards A makes another unprivileged will which purports to revoke the first. This is a revocation.

(*b.*) A has made an unprivileged will. Afterwards, A being entitled to make a privileged will, makes a privileged will, which purports to revoke his unprivileged will. This is a revocation.

This section applies to Hindus etc.

See p. 118.

58. No obliteration, interlineation, or other alteration made in any unprivileged will after the execution thereof shall have any effect, except so far as the words or meaning of the will shall have been thereby rendered illegible or undiscernible, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; save that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.§

59. A privileged will or codicil may be revoked by the testator, by an unprivileged will or codicil, or by any act expressing an intention to revoke it, and accompanied with such formalities as would be sufficient to give validity to a privileged will, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Explanation.—In order to the revocation of a privileged will or codicil by an act accompanied with such formalities as would be sufficient to give validity to a privileged will, it is not necessary that the testator should at the time of doing that act be in a situation which entitles him to make a privileged will.

See p. 125.

60. No unprivileged will or codicil, nor any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same;

and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked

* This section and sections 57 to 60 (both inclusive) extend to the wills of Hindus, &c., in the Lower Provinces and in the towns of Madras and Bombay, Act No. XXI of 1870.

before the revocation of the whole thereof, unless an intention to the contrary shall be shown by the will or codicil.

This section applies to Hindus etc.

See p. 125.

PART XI.*

Of the Construction of Wills.

61. It is not necessary that any technical words or terms of art shall be used in a will, but only that the wording shall be such that the intentions of the testator can be known therefrom.

See pp. 74, 129.

62. For the purpose of determining questions as to what person or what property is denoted by any words used in a will, a Court must inquire into every material fact relating to the persons who claim to be interested under such will, the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used.

Illustrations.

(*a.*) A, by his will, bequeaths 1,000 rupees to his eldest son, or to his youngest grandchild, or to his cousin Mary. A Court may make inquiry in order to ascertain to what person the description in the will applies.

(*b.*) A, by his will, leaves to B "his estate called Black Acre." It may be necessary to take evidence in order to ascertain what is the subject-matter of the bequest; that is to say, what estate of the testator's is called Black Acre.

(*c.*) A, by his will, leaves to B "the estate which he purchased of C." It may be necessary to take evidence in order to ascertain what estate the testator purchased of C.

See pp. 133, 138, 148.

63. Where the words used in the will to designate or describe a legatee, or a class or legatees, sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect.

A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name.

Illustrations.

(*a.*) A bequeaths a legacy "to Thomas, the second son of his brother John." The testator has an only brother, named John, who has no son named Thomas, but has a second son whose name is William. William shall have the legacy.

(*b.*) A bequeaths a legacy "to Thomas, the second son of his brother John." The testator has an only brother named John, whose first son is named Thomas, and whose second son is named William. Thomas shall have the legacy.

(*c.*) The testator bequeaths his property "to A and B, the legitimate children of C." C has no legitimate child, but has two illegitimate children, A and B. The bequest to A and B takes effect, although they are illegitimate.

(*d.*) The testator gives his residuary estate to be divided among "his seven children," and proceeding to enumerate them mentions six names only. This omission shall not prevent the seventh child from taking a share with the others.

(*e.*) The testator having six grandchildren, makes a bequest to "his six grandchildren," and proceeding to mention them by their Chrisrian names, mentions one twice over, omitting another altogether. The one whose name is not mentioned shall take a share with the others.

(*f.*) The testator bequeaths "1,000 rupees to each of the three children of A." At the date of the will A has four children. Each of these four children shall, if he survives the testator, receive a legacy of 1,000 rupees.

See p. 140.

64. Where any word material to the full expression of the meaning has been omitted, it may be supplied by the context.

* Of this Part, sections 61 to 77 (both inclusive) and sections 88 to 98 apply to the wills of Hindus, &c., in the Lower Provinces and in the towns of Madras and Bombay, Act No. XXI of 1870.

Illustration.

The testator gives a legacy of "five hundred" to his daughter A, and a legacy of "five hundred rupees" to his daughter B. A shall take a legacy of five hundred rupees.

See pp. 132, 145.

65. If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect.

Illustrations.

(*a.*) A bequeaths to B "his marsh-lands lying in *L*, and in the occupation of X." The testator had marsh-lands lying in L, but no marsh-lands in the occupation of X. The words "in the occupation of X" shall be rejected as erroneous, and the marsh-lands of the testator lying in L shall pass by the bequest.

(b.) The testator bequeaths to A "his zamindari of Rampur." He had an estate at Rampur, but it was a taluq and not a zamindari. The taluq passes by this bequest.

See p. 137.

66. If the will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such property, and it shall not be lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply.

Explanation.—In judging whether a case falls within the meaning of this section, any words which would be liable to rejection under the sixty-fifth section are to be considered as struck out of the will.

Illustrations.

(*a.*) A bequeaths to B "his marsh-lands lying in L, and in the occupation of X." The testator had marsh-lands lying in L, some of which were in the occupation of X, and some not in the occupation of X. The bequest shall be considered as limited to such of the testator's marsh-lands lying in L, as were in the occupation of X.

(*b.*) A bequeaths to B "his marsh-lands lying in L, and in the occupation of X, comprising 1,000 bighas of land." The testator had marsh-lands lying in L, some of which were in the occupation of X, and some not in the occupation of X. The measurement is wholly inapplicable to the marsh-lands of either class, or to the whole taken together. The measurement shall be considered as struck out of the will, and such of the testator's marsh-lands lying in L, as were in the occupation of X, shall alone pass by the bequest.

See pp. 139, 140.

67. Where the words of the will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended.

Illustrations.

(*a.*) A man having two cousins of the name of Mary, bequeaths a sum of money to "his cousin Mary." It appears that there are two persons, each answering the description in the will. That description, therefore, admits of two applications, only one of which can have been intended by the testator. Evidence is admissible to show which of the two applications was intended.

(*b.*) A, by his will, leaves to B "his estate called Sultanpur Khurd." It turns out that he had two estates called Sultanpur Khurd. Evidence is admissible to show which estate was intended.

See pp. 148, 149.

68. Where there is an ambiguity or deficiency on the face of the will, no extrinsic evidence as to the intentions of the testator shall be admitted.

Illustrations.

(*a.*) A man has an aunt Caroline and a cousin Mary, and has no aunt of the name of Mary. By his will he bequeaths 1,000 rupees to "his aunt Caroline" and 1,000 rupees to "his aunt Caroline" and 1,000 rupees to "his cousin Mary," and afterwards bequeaths 2,000 rupees to "his before-mentioned aunt Mary." There is no person to whom the description given in the will can apply, and evidence is not admissible to show who was meant by "his before-mentioned aunt Mary." The bequest is therefore void for uncertainty under the seventy-sixth section.

(*b.*) A bequeaths 1,000 rupees to , leaving a blank for the name of the legatee. Evidence is not admissible to show what name the testator intended to insert.

(*c.*) A bequeaths to B rupees or "his state of ," Evidence is not admissible to show what sum or what estate the testator intended to insert.

See p. 149.

69. The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other; and for this purpose a codicil is to be considered as part of the will.

Illustrations.

(*a.*) The testator gives to B a specific fund or property at the death of A, and by a subsequent clause gives the whole of his property to A. The effect of the several clauses taken together is to vest the specific fund or property in A for life, and after his decease in B; it appearing from the bequest to B that the testator meant to use in a restricted sense the words in which he describes what he gives to A.

(*b.*) Where a testator, having an estate one part of which is called Black Acre, bequeaths the whole of his estate to A, and in another part of his will bequeaths Black Acre to B, the latter bequest is to be read as an exception out of the first, as if he had said, "I give Black Acre to B, and all the rest of my estate to A."

See pp. 132, 156, 157, 159.

70. General words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in a restricted sense; and words may be understood in a wider sense than that which they usually bear, where it may be collected from the other words of the will that the testator meant to use them in such wider sense.

Illustrations.

(*a.*) A testator gives to A "his farm in the occupation of B," and to C "all his marsh-lands in L." Part of the farm in the occupation of B consists of marsh-lands in L, and the testator also has other marsh-lands in L. The general words, "all his marsh-lands in L," are restricted by the gift to A. A takes the whole of the farm in the occupation of B, including that portion of the farm which consists of marsh-lands in L.

(*b.*) The testator (a sailor on ship-board) bequeathed to his mother his gold ring, buttons, and chest of clothes, and to his friend A (a shipmate) his red box, clasp-knife, and all things not before bequeathed. The testator's share in a house does not pass to A under this bequest.

(*c.*) A, by his will, bequeathed to B all his household furniture, plate, linen, china, books, pictures, and all other goods of whatever kind; and afterwards bequeathed to B a specified part of his property. Under the first bequest, B is entitled only to such articles of the testator's as are of the same nature with the articles therein enumerated.

See pp. 151, 152, 153.

71. Where a clause is susceptible of two meanings, according to one of which it has some effect, and according to the other it can have none, the former is to be preferred.

See pp. 132, 154.

72. No part of a will is to be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.

See pp. 132, 155.

73. If the same words occur in different parts of the same will, they must be taken to have been used everywhere in the same sense, unless there appears an intention to the contrary.

See p. 156.

74. The intention of the testator is not to be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

Illustrations.

The testator by a will made on his death-bed bequeathed all his property to C D for life, and after his decease to a certain hospital. The intention of the testator cannot take effect to its full extent, because the gift to the hospital is void under the hundred and fifth section, but it shall take effect so far as regards the gift to C D.

See pp. 156, 157.

75. Where two clauses or gifts in a will are irreconcileable, so that they cannot possibly stand together, the last shall prevail.

Illustrations.

(*a.*) The testator by the first clause of his will leaves his estate of Ramnagar "to A," and by the last clause of his will leaves it "to B and not to A." B shall have it.

(*b.*) If a man at the commencement of his will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of B, the latter disposition shall prevail.

See pp. 132, 155, 157.

76. A will or bequest not expressive of any definite intention is void for uncertainty.

Illustration.

If a testator says—"I bequeath goods to A;" or "I bequeath to A;" or "I have to A all the goods mentioned in a schedule," and no schedule is found; or "I bequeath 'money,' 'wheat,' 'oil,'" or the like, without saying how much, this is void.

See p. 58.

77. The description contained in a will, of property the subject of gift, shall, unless a contrary intention appear by the will, be deemed to refer to and comprise the property answering that description at the death of the testator.

See pp. 133, 163, 166, 168, 170, 194, 279.

78. Unless a contrary intention shall appear by the will, a bequest of the estate of the testator shall be construed to include any property which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power;

and a bequest of property described in a general manner shall be construed to include any property to which such description may extend, which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power.

This section does not apply to Hindus etc. See pp. 67, 168.

79. Where property is bequeathed to or for the benefit of such of certain objects as a specified person shall appoint, or for the benefit of certain objects in such proportions as a specified person shall appoint; and the will does not provide for the event of no appointment being made; if the power given by the will be not exercised, the property belongs to all the objects of the power in equal shares.

Illustration.

A, by his will, bequeaths a fund to his wife for her life, and directs that at her death it shall be divided among his children in such proportions as she shall appoint. The widow dies without having made any appointment. The fund shall be divided equally among the children.

This section does not apply to Hindus etc.

See p. 170.

80. Where a bequest is made to the "heirs," or "right heirs," or "relations," or "nearest relations," or "family," or "kindred," or "nearest of kin," or "next-of-kin," of a particular person, without any qualifying terms, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person, and he had died intestate in respect of it, leaving assets for the payment of his debts independently of such property.

Illustrations.

(*a.*) A leaves his property "to his own nearest relations." The property goes to those who would be entitled to it if A had died intestate leaving assets for the payment of his debts independently of such property.

(*b*). A bequeaths 10,000 rupees "to B for his life, and after the death of B, to his own "right heirs." The legacy after B's death belongs to those who would be entitled to it if it had formed part of A's unbequeathed property.

(*c.*) A leaves his property to B; but if B dies before him, to B's next-of-kin: B dies before A; the property devolves as if it had belonged to B, and he had died intestate, leaving assets for the payment of his debts independently of such property.

(*d.*) A leaves 10,000 rupees "to B for his life, and after his decease, to the heirs of C." The legacy goes as if it had belonged to C, and he had died intestate, leaving assets for the payment of his debts independently of the legacy.

This section does not apply to Hindus etc.

See pp. 175, 178.

81. Where a bequest is made to the "representatives," or "legal representatives," or "executors or administrators" of a particular person, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person, and he had died intestate in respect of it.

Illustration.

A bequest is made to the "legal representatives" of A. A has died intestate and insolvent. B is his administrator. B is entitled to receive the legacy, and shall apply it in the first place to the discharge of such part of A's debts as may remain unpaid: if there be any surplus, B shall pay it to those persons who at A's death would have been entitled to receive any property of A's which might remain after payment of his debts, or to the representatives of such persons.

This section does not apply to Hindus etc.

See pp. 175, 176.

82. Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him.*

See pp. 173, 295.

83. Where property is bequeathed to a person, with a bequest in the alternative to another person or to a class of persons; if contrary intention does not appear by the will, the legatee first named shall be entitled to the legacy, if he be alive at the time when it takes effect; but if he be then dead, the person or class of persons named in the second branch of the alternative shall take the legacy.

Illustrations.

(*a.*) A bequest is made to A or to B. A survives the testator. B takes nothing.

(*b.*) A bequest is made to A or to B. A dies after the date of the will, and before the testator. The legacy goes to B.

(*c.*) A bequest is made to A or to B. A is dead at the date of the will. The legacy goes to B.

(*d*) Property is bequeathed to A or his heirs. A survives the testator. A takes the property absolutely.

(*e.*) Property is bequeathed to A or his nearest of kin. A dies in the lifetime of the testator. Upon the death of the testator, the bequest to A's nearst of kin takes effect.

(*f.*) Property is bequeathed to A for life, and after his death to B or his heirs. A and B survive the testator. B dies in A's lifetime. Upon A's death the bequest to the heirs of B takes effect.

(*g.*) Property is bequeathed to A for life, and after his death to B or his heirs. B dies in the testator's lifetime. A survives the testator. Upon A's death the bequest to the heirs of B takes effect.

See pp. 179, 180, 198.

84. Where property is bequeathed to a person, and words are added which describe a class of persons, but do not denote them as direct objects of distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will.

Illustrations.

(*a.*) A bequest is made—
to A and his children,
to A and his children by his present wife,
to A and his heirs,
to A and the heirs of his body,
to A and the heirs male of his body,
to A and the heirs female of his body,
to A and his issue,
to A and his family,
to A and his descendants,
to A and his representative,
to A anl his personal representatives,
to A, his executors and administrators.

In each of these cases, A takes the whole interest which the testator had in the property.

(*b.*) A bequest is made to A and his brothers. A and his brothers are jointly entitled to the legacy.

(*c.*) A bequest is made to A for life, and after his death to his issue. At the death of A

* This section, and sections 83 and 85 and also ss 88—89 apply to the wills of 1870. &c., in the Lower Provinces and in the towns of Madras and Bombay, Act No, XXI of Hindus

the property belongs in equal shares to all persons who shall then answer the description of issue of A.

This section does not apply to Hindus etc.

See pp. 175, 181, 187, 197.

85. Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in their ordinary sense applicable shall take the legacy.

See p 208.

86. The word "children" in a will applies only to lineal descendants in the first degree;

the word "grandchildren" applies only to lineal descendants in the second degree of the person whose "children," or "grandchildren," are spoken of;

the words "nephews" and "nieces" apply only to children of brothers or sisters;

the words "cousins" or "first cousins," or "cousins-german" apply only to children of brothers or of sisters of the father or mother of the person whose "cousins," or "first cousins," or "cousins-german," are spoken of;

the words "first cousins once removed" apply only to children of cousins-german, or to cousins-german of a parent, of the person whose "first cousins once removed" are spoken of;

the words "second cousins" apply only to grandchildren of brothers or of sisters of the grandfather or grandmother of the person whose "second cousins" are spoken of;

the words "issue" and "descendants" apply to all lineal descendants whatever of the person whose "issue" or "descendants" are spoken of.

Words expressive of collateral relationship apply alike to relatives of full and of half blood.

All words expressive of relationship apply to a child in the womb who is afterwards born alive.

This section does not apply to Hindus etc.

See pp. 175, 187.

87. In the absence of any intimation to the contrary in the will, the term "child," "son," or "daughter," or any word which expresses relationship, is to be understood as denoting only a legitimate relative, or where there is no such legitimate relative, a person who has acquired, at the date of the will, the reputation of being such relative.

Illustrations.

(*a.*) A, having three children, B, C and D, of whom B and C are legitimate and D is illegitimate, leaves his property to be equally divided among "his children." The property belongs to B and C in equal shares, to the exclusion of D.

(*b.*) A, having a niece of illegitimate birth, who has acquired the reputation of being his niece, and having no legitimate niece, bequeaths a sum of money to his niece. The illegitimate niece is entitled to the legacy.

(*c.*) A, having in his will enumerated his children, and named as one of them B, who is illegitimate, leaves a legacy to "his said children." B will take a share in the legacy along with the legitimate children.

(*d.*) A leaves a legacy to the "children of B." B is dead, and has left none but illegitimate children. All those who had, at the date of the will, acquired the reputation of being the children of B are objects of the gift.

(*e.*) A bequeathed a legacy to "the children of B." B never had any legitimate child. C and D had, at the date of the will, acquired the reputation of being children of B. After the date of the will, and before the death of the testator, E and F were born, and acquired the reputation of being children of B. Only C and D are objects of the bequest.

(*f.*) A makes a bequest in favour of his child by a certain woman, not his wife. B had acquired, at the date of the will, the reputation of being the child of A by the woman designated. B takes the legacy.

(*g.*) A makes a bequest in favour of his child to be born of a woman, who never becomes his wife. The bequest is void.

(*h.*) A makes a bequest in favour of the child of which a certain woman, not married to him, is pregnant. The bequest is valid.

This section does not apply to Hindus etc.

See pp. 175, 182, 184, 186.

88. Where a will purports to make two bequests to the same person, and a question arises whether the testator intended to make the second bequest instead of or in addition to the first; if there is nothing in the will to show what he intended, the following rules shall prevail in determining the construction to be put upon the will:—

First.—If the same specific thing is bequeathed twice to the same legatee in the same will, or in the will and again in a codicil, he is entitled to receive that specific thing only.

Second.—Where one and the same will or one and the same codicil purports to make, in two places, a bequest to the same person of the same quantity or amount of any thing, he shall be entitled to one such legacy only.

Third.—Where two legacies of unequal amount are given to the same person in the same will, or in the same codicil, the legatee is entitled to both.

Fourth.—Where two legacies, whether equal or unequal in amount, are given to the same legatee, one by a will and the other by a codicil, or each by a different codicil, the legatee is entitled to both legacies.

Explanation.—In the four last rules, the word "will" does not include a codicil.

Illustrations.

(*a.*) A having ten shares, and no more, in the Bank of Bengal, made his will, which contains near its commencement the words "I bequeath my ten shares in the Bank of Bengal to B." After other bequests, the will concludes with the words "and I bequeath my ten shares in the Bank of Bengal to B." B is entitled simply to receive A's ten shares in the Bank of Bengal.

(*b.*) A having one diamond-ring which was given him by B, bequeathed to C the diamond-ring which was given him by B A afterwards made a codicil to his will, and thereby, after giving other legacies, he bequeathed to C the dimond-ring which was given him by B. C can claim nothing except the diamond-ring which was given to A by B.

(*c.*) A, by his will, bequeaths to B the sum of 5,000 rupees, and afterwards. in the same will, repeats the bequest in the same words. B is entitled to one legacy of 5,000 rupees only.

(*d*) A, by his will, bequeaths to B the sum of 5,000 rupees, and afterwads, by the same will, bequeaths to B the sum of 6,000 rupees. B is entitled to 11,000 rupees.

(*e.*) A, by his will, bequeaths to B 5,000 rupees. and by a codicil to the will he bequeaths to him 5,000 rupees. B is entitled to receive 10,000 rupees.

(*f.*) A, by one codicil to his will, bequeaths to B 5,000 rupees, and by another codicil bequeaths to him 6,000 rupees. B is entitled to receive 11,000 rupees.

(*g.*) A, by his will, bequeaths "500 rupees to B because she was his nurse," and in another part of the will bequeaths 500 rupees to B "because she went to Englond with his children." B is entitled to receive 1,000 rupees.

(*h.*) A, by his will, bequeaths to B the sum of 5,000 rupees, and also, in another part of the will, an annuity of 400 rupees, B is entitled to both legacies.

(*i.*) A, by his will, bequeaths to B the sum of 5,000 rupees, and also bequeaths to him the sum of 5,000 rupees if he shall attain the age of 18. B is entitled absolutely to one sum of 5,000 rupees, and takes a contingent interest in another sum of 5,000 rupees.*

See pp. 190, 191, 193, 195.

89. A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

Illustrations.

(*a.*) A makes her will, consisting of several testamentary papers, in one of which are contained the following words:—"I think there will be something left, after all funeral expenses, &c., to give to B, now at school, towards equipping him to any profession he may hereafter be appointed to." B is constituted residuary legatee.

(*b.*) A makes his will, with the following passage at the end of it:—"I believe there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire B to do, and keep the residue for her own use and pleasure." B is constituted the residuary legatee.

(*c.*) A bequeaths all his property to B, except certain stocks and funds, which he bequeaths to C. B is the residuary legatee.

90. Under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect.

Illustration.

A by his will bequeaths certain legacies, one of which is void under the hundred and fifth section and another lapses by the death of the legatee. He bequeaths the residue of his property to B. After the date of his will, A purchases a zamindari, which belongs to him at

* This section, and sections 89 to 103 (both inclusive), apply to the wills of Hindus, &c., in the Lower Provinces and in the towns of Madras and Bombay, Act No. XXI of 1870.

the time of his death. B is entitled to the two legacies and the zamindari as part of the residue.

See pp. 193, 195.

91. If a legacy be given in general terms, without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and if he dies without having received it, it shall pass to his representatives.

See pp. 196, 234.

92. If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appear by the will that the testator intended that it should go to some other person.

In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

Illustrations.

(*a.*) The testator bequeaths to B "500 rupees which B owes him." B dies before the testator; the legacy lapses.

(*b.*) A bequest is made to A and his children. A dies before the testator or happens to be dead when the will is made. The legacy to A and his children lapses.

(*c.*) A legacy is given to A, and in case of his dying before the testator, to B. A dies before the testator. The legacy goes to B.

(*d.*) A sum of money is bequeathed to A for life, and after his death to B. A dies in the lifetime of the testator; B survives the testator. The bequest to B takes effect.

(*e.*) A sum of money is bequeathed to A on his completing his eighteenth year, and in case he should die before he completes his eighteenth year, to B. A completes his eighteenth year, and dies in the lifetime of the testator. The legacy to A lapses, and the bequest to B does not take effect.

(*f.*) The testator and the legatee perished in the same shipwreck. There is no evidence to show which died first. The legacy will lapse.

See pp. 196, 197, 199.

93. If a legacy be given to two persons jointly, and one of them die before the testator, the other legatee takes the whole.

Illustration.

The legacy is simply to A and B. A dies before the testator. B takes the legacy.

See p. 199.

94. But where a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then if any legatee die before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

Illustration.

A sum of money is bequeathed to A, B and C, to be equally divided among them. A dies before the testator. B and C shall only take so much as they would have had if A had survived the testator.

See p. 200.

95. Where the share that lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of.

Illustration.

The testator bequeaths the residue of his estate to A, B and C, to be equally divided between them. A dies before the testator, He one third of the residue goes as undisposed of.

See p. 205.

96. Where a bequest shall have been made to any child or other lineal descendant of the testator, and the legatee shall die in the lifetime of the testator, but any lineal descendant of his shall survive the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Illustration.

A makes his will, by which he bequeaths a sum of money to his son B for his own absolute use and benefit. B dies before A, leaving a son C who survives A, and having made his will whereby he bequeaths all his property to his widow D. The money goes to D.

See pp. 202, 203.

97. Where a bequest is made to one person for the benefit of another, the legacy does not lapse by the death, in the testator's lifetime, of the person to whom the bequest is made.

See pp. 198, 204.

98. Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as shall be alive at the testator's death.

Exception.—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise, the property shall at that time go to such of them as shall be then alive, and to the representatives of any of them who have died since the death of the testator.

Illustrations.

(*a.*) A, bequeaths 1,000 rupees to "the children of B" without saying when it is to be distributed among them. B had died previous to the date of the will, leaving three children, C, D and E. E died after the date of the will, but before the death of A. C and D survive A. The legacy shall belong to C and D, to the exclusion of the representatives of E.

(*b.*) A bequeaths a legacy to the children of B. At the time of the testator's death, B has no children. The bequest is void.

(*c.*) A lease for years of a house was bequeathed to A for his life, and after his decease to the children of B. At the death of the testator, B had two children living, C and D; and he never had any other child. Afterwards, during the lifetime of A, C died, leaving E his executor. D has survived A. D and E are jointly entitled to so much of the leasehold terms as remains unexpired.

(*d.*) A sum of money was bequeathed to A for her life, and after her decease to the children of B. At the death of the testator, B had two children living, C and D, and after that event, children E and F, were born to B. C and E died in the lifetime of A, C having made a will, E having made no will, A has died leaving D and F surviving her. The legacy is to be divided into four equal parts, one of which is to be paid to the executor of C, one to D, one to the administrator of E, and one to F.

(*e.*) A bequeaths one-third of his lands to B for his life, and after his decease to the sisters of B. At the death of the testator, B had two sisters living, C and D, and after that event another sister E was born. C died during the life of B; D and E have survived B. One-third of A's lands belongs to D, E and the representatives of C, in equal shares.

(*f.*) A bequeaths 1,000 rupees to B for life, and after his death equally among the children of C. Up to the death of B, C had not had any child, The bequest after the death of B is void.

(*g.*) A bequeaths 1,000 rupees to "all the children born or to be born" of B, to be divided among them at the death of C. At the death of the testator, B has two children living, D and E. After the death of the testator, but in the lifetime of C, two other children, F and G, are born to B. After the death of C, another child if born to B. The legacy belongs to D, E, F and G, to the exclusion of the after-born child of B.

(*h.*) A bequeaths a fund to the children of B, to be divided among them when the eldest shall attain majority. At the testator's death, B had one child living, named C, He afterwards had two other children, named D and E. E died, but C and D were living when C attained majority. The fund belongs to C, D and the representatives of E, to the exclusion of any child who may be born to B after C's attaining majority.

See pp. 167, 201, 209, 210, 211, 212.

PART XII.*

OF VOID BEQUESTS.

99. Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Exception.—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest, or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or if he be dead, to his representatives.

* Sections 99 to 103 (both inclusive) of this part apply to Hindus etc.

Illustrations.

(*a.*) A bequeaths 1,000 rupees to the eldest son of B. At the death of the testator B has no son. The bequest is void.

(*b.*) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son. Afterwards, during the life of B, a son is born to C. Upon B's death, the legacy goes to C's son.

(*c*) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son: afterwards, during the life of B, a son, named D, is born to C. D dies, then B dies. The legacy goes to the representative of D.

(*d.*) A bequeaths his estate of Greenacre to B for life, and at his decease to the eldest son of C. Up to the death of B, C has had no son. The bequest to C's eldest son is void.

(*e.*) A bequeaths 1,000 rupee to the eldest son of C, to be paid to him after the death of B. At the death of the testator, C has no son, but a son is afterwards born to him during the life of B and is alive at B's death. C's son is entitled to the 1,000 rupees.

See pp. 213, 214.

100. Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

Illustrations.

(*a.*) Property is bequeathed to A for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, A has no son. Here the bequest to A's eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his life is void.

(*b.*) A fund is bequeathed to A for his life, and after his death to his daughter. A survives the testator. A has daughters, some of whom were not in existence at the testator's death. The bequest to A's daughters comprises the whole interest that remains to the testator in the thing bequeathed. The bequest to A's daughters is valid.

(*c.*) A fund is bequeathed to A for his life, and after his death to his daughters, with a direction that if any of them marries under the age of eighteen, her portion shall be settled so that it may belong to herself for life, and may be divisible among her children after her death. A has no daughters living at the time of the testator's death, but has daughters born afterwards who survive him. Here the direction for a settlement has the effect, in the case of each daughter who marries under eighteen, of substituting for the absolute bequest to her a bequest to her merely for her life: that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.

(*d.*) A bequeaths a sum of money to B for life, and directs that upon the death of B the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself, for life, and may be divided among her children after her death. B has no daughter living at the time of the testator's death. In this case the only bequest to the daughters of B is contained in the direction to settle the fund, and this direction amounts to a bequest, to persons not yet born, of a life-interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of B is void.

See pp. 213, 217, 224, 225.

101. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Illustrations.

(*a.*) A fund is bequeathed to A for his life; and after his death to B for his life; and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator. Here the son of B who shall first attain the age of 25, may be a son born after the death of the testator: such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B; and the vesting of the fund may thus be delayed beyond the lifetime of A and B, and the minority of the sons of B. The bequest after B's death is void.

(*b.*) A fund is bequeathed to A for his life; and after his death to B for his life; and after B's death to such of B's sons as shall first attain the age of 25. B dies in the lifetime of the testator, leaving one or more sons. In this case the sons of B are persons living at

the time of the testator's decease, and the time when either of them will atatin 25 necessarily falls within his own lifetime. The bequest is valid.

(*c.*) A fund is bequeathed to A for his life, and after his death to B for his life, with a direction that after B's death it shall be divided amongst such of B's children as shall attain the age of 18; but that if no child of B shall attain that age, the fund shall go to C. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of B, a person living at the testator's decease. All the bequests are valid.

(*d.*) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughter whose share it was. All these provisions are valid.

See pp. 213, 214, 215, 216, 217, 225.

102. If a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in the two last preceding sections, or either of them, such bequest shall be wholly void.

Illustrations.

(*a.*) A fund is bequeathed to A for life, and after his death to all his children who shall attain the age of 25. A survives the testator, and has some children living at the testator's death. Each child of A's living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But A may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of A. The bequest to A's children, therefore, is inoperative as to any child born after the testator's death; and as it is given to all his children as a class, it is not good as to any division of that class, but is wholly void.

(*b.*) A fund is bequeathed to A for his life, and after his death to B, C, D and all other the children of A who shall attain the age of 25. B, C, D are children of A living at the testator's decease. In all other respects the case is the same as that supposed in illustration (*a.*) The mention of B, C and D by name does not prevent the bequest from being regarded as a bequest to a class, and the bequest is wholly void.

See pp. 213, 217, 224, 225.

103. Where a bequest is void by reason of any of the rules contained in the three last preceding sections, any bequest contained in the same will, and intended to take effect after or upon failure of such prior bequest, is also void.

Illustrations.

(*a*) A fund is bequeathed to A for his life, and after his death to such of his sons as shall first attain the age of 25, for his life, and after the decease of such son, to B. A and B survive the testator. The bequest to B is intended to take effect after the bequest to such of the sons of A as shall first attain the age of 25, which bequest is void under section 101. The bequest to B is void.

(*b.*) A fund is bequeathed to A for his life, and after his death to such of his sons as shall first attain the age of 25, and if no son of A shall attain that age, to B. A and B survive the testator. The bequest to B is intended to take effect upon failure of the bequest to such of A's sons as shall first attain the age of 25, which bequest is void under section 101. The bequest to B is void.

See *ante*, p. 225.

104. A direction to accumulate the income arising from any property shall be void; and the property shall be disposed of as if no accumulation had been directed.

Exception.—Where the property is immoveable, or where accumulation is directed to be made from the death of the testator, the direction shall be valid in respect only of the income arising from the property within one year next following the testator's death;

and at the end of the year such property and income shall be disposed of respectively, as if the period during which the accumulation has been directed to be made had elapsed.

Illustrations.

(*a.*) The will directs that the sum of 10,000 rupees shall be invested in Government-securities, and the income accumulated for 20 years and that the principal, together with the accumulations, shall then be divided between A, B and C. A, B and C are entitled to receive the sum of 10,000 rupees at the end of the year from the testator's death.

(*b.*) The will directs that 10,000 rupees shall be invested, and the income accumulated

until A shall marry, and shall then be paid to him. A is entitled to receive 10,000 rupees at the end of a year from the testator's death.

(*c.*) The will directs that the rents of the farm of Sultanpur shall be accumulated for ten years, and that the accumulation shall be then paid to the eldest son of A. At the death of the testator, A has an eldest son living, named B. B shall receive at the end of one year from the testator's death the rents which have accrued during the year, together with any interest which may have been made by investing them.

(*d.*) The will directs that the rents of the farm of Sultanpur shall be accumulated for ten years, and that the accumulations shall then be paid to the eldest son of A. At the death of the testator, A has no son. The bequest is void.

(*e.*) A bequeaths a sum of money to B, to be paid to him when he shall attain the age of 18, and directs the interest to be accumulated till he shall arrive at that age. At A's death the legacy becomes vested in B; and so much of the interest as is not required for his maintenance and education is accumulated, not by reason of the direction contained in the will, but in consequence of B's minority.

This section does not apply to Hindus etc.

See *ante*, pp. 226, 227.

105. No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons.

This section does not apply to Hindus etc.

Illustration.

A having a nephew makes a bequest by a will not executed nor deposited as required—

for the relief of poor people;
for the maintenance of sick soldiers;
for the erection or support of a hospital;
for the education and preferment of orphans;
for the support of scholars;
for the erection or support of a school;
for the building and repairs of a bridge;
for the making of roads;
for the erection or support of a church;
for the repairs of a church;
for the benefit of ministers of religion;
for the formation or support of a public garden. All these bequests are void.

See *ante*, pp. 157, 228, 232.

PART XIII.

OF THE VESTING OF LEGACIES.*

106. Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy.

And in such cases the legacy is from the testator's death said to be vested in interest.

Explanation.—An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person.

Illustrations.

(*a.*) A bequeaths to B 100 rupees, to be paid to him at the death of C. On A's death the legacy becomes vested in interest in B, and if he dies before C, his representatives are entitled to the legacy.

* This part applies to the wills of Hindus, &c., in the Lower Provinces and in the towns of Madras and Bombay, Act XXI of 1870.

(*b.*) A bequeaths to B 100 rupees, to be paid to him upon his attaining the age of 18. On A's death the legacy becomes vested in interest in B.

(*c.*) A fund is bequeathed to A for life, and after his death to B. On the testator's death the legacy to B becomes vested in interest in B.

(*d.*) A fund is bequeathed to A until B attains the age of 18, and then to B. The legacy to B is vested in interest from the testator's death.

(*e.*) A bequeaths the whole of his property to B upon trust to pay certain debts out of the income, and then to make over the fund to C. At A's death the gift to C becomes vested in interest in him.

(*f.*) A fund is bequeathed to A, B and C in equal shares, to be paid to them on their attaining the age of 18 respectively, with a proviso that, if all of them die under the age of 18, the legacy shall devolve upon D. On the death of the testator, the shares vest in interest in A, B and C, subject to be devested in case A, B and C shall all die under 18, and upon the death of any of them (except the last survivor) under the age of 18, his vested interest passes, so subject, to his representatives.

See *ante*, pp. 234—237.

107. A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens.

A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible.

In either case, until the condition has been fulfilled, the interest of the legatee is called contingent.

Exception.—Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit; the bequest of the fund is not contingent.

Illustrations.

(*a.*) A legacy is bequeathed to D in case A, B and C shall all die under the age of 18. D has a contingent interest in the legacy until A, B and C all die under 18, or one of them attains that age.

(*b.*) A sum of money is bequeathed to A "in case he shall attain the age of 18," or, "when he shall attain the age of 18." A's interest in the legacy is contingent until the condition shall be fulfilled by his attaining that age.

(*c*) An estate is bequeathed to A for life, and after his death to B, if B shall then be living; but if B shall not be then living, to C. A, B and C survive the testator. B and C each take a contingent interest in the estate until the event which is to vest it in one or in the other shall have happened.

(*d.*) An estate is bequeathed as in the case last supposed. B dies in the lifetime of A and C. Upon the death of B, C acquires a vested right to obtain possession of the estate upon A's death.

(*e.*) A legacy is bequeathed to A when she shall attain the age of 18, or shall marry under that age with the consent of B, with a proviso that, if she shall not attain 18, or marry under that age with B's consent, the legacy shall go to C. A and C each take a contingent interest in the legacy. A attains the age of 18. A becomes absolutely entitled to the legacy, although she may have married under 18, without the consent of B.

(*f.*) An estate is bequeathed to A until he shall marry, and after that event to B. B's interest in the bequest is contingent until the condition shall be fulfilled by A's marrying.

(*g.*) An estate is bequeathed to A until he shall take advantage of the Act for the Relief of Insolvent Debtors, and after that event to B. B's interest in the bequest is contingent until A takes advantage of the Act.

(*h.*) An estate is bequeathed to A if he shall pay 500 rupees to B. A's interest in the bequest is contingent until he has paid 500 rupees to B.

(*i.*) A leaves his farm of Sultanpur Khurd to B, if B shall convey his own farm of Sultanpur Buzurg to C. B's interest in the bequest is contingent until he has conveyed the latter farm to C.

(*j*) A fund is bequeathed to A if B shall not marry C within five years after the testator's death. A's interest in the legacy is contingent, until the condition shall be fulfilled by the expiration of the five years without B's having married C, or by the occurrence, within that period, of an event which makes the fulfilment of the condition impossible

(*k.*) A fund is bequeathed to A if B shall not make any provision for him by will The legacy is contingent until B's death.

(*l.*) A bequeaths to B 500 rupees a year upon his attaining the age of 18, and directs that the interest, or a competent part thereof, shall be applied for his benefit until he reaches that age. The legacy is vested.

(*m.*) A bequeaths to B 500 rupees when he shall attain the age of 18, and directs that a certain sum, out of another fund, shall be applied for his maintenance until he arrives at that age. The legacy is contingent.

See *ante*, pp. 239, 240, 243, 244, 258, 259, 263.

108 Where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy.

Illustration.

A fund is bequeathed to such of the children of A as shall attain the age of 18, with a direction that, while any child of A shall be under the age of 18, the income of the share, to which it may be presumed he will be eventually entitled, shall be applied for his maintenance and education. No child of A who is under the age of 18 has a vested interest in the bequest.

See *ante*, pp. 242, 243, 259.

PART XIV.*

OF ONEROUS BEQUESTS.

109. Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Illustrations.

A having shares in X, a prosperous joint stock company, and also shares in Y, a joint stock company in difficulties, in respect of which shares heavy calls are expected to be made bequeaths to B all his shares in join, stock companies. B refuses to accept the shares in Y. He forfeits the shares in X.

See *ante*, pp. 259, 272.

110. Where a will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous.

Illustration.

A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be let for, bequeaths to B the lease and a sum of money. B refuses to accept the lease. He shall not by this refusal forfeit the money.

See *ante*, pp. 272, 273.

PART XV.†

OF CONTINGENT BEQUESTS.

111. Where a legacy is given if a specified uncertain event shall happen, and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable.

Illustrations.

(*a.*) A legacy is bequeathed to A, and in case of his death, to B. If A survives the testator, the legacy to B does not take effect.

(*b.*) A legacy is bequeathed to A, and in case his death without children, to B. If A survives the testator or dies in his lifetime leaving a child, the legacy to B does not take effect.

(*c.*) A legacy is bequeathed to A when and if he attains the age of 18, and in case of his death, to B. A attains the age of 18. The legacy to B does not take effect.

(*d.*) A legacy is bequeathed to A for life, and after his death to B, and, "in case of B's

* This part applies to the wills of Hindus, &c., in the Lower Provinces of Bengal and in the towns of Madras and Bombay, Act XXI of 1870, s. 2.

† This part applies to the wills of Hindus, in the Lower Provinces of Bengal and in the Towns of Madras and Bombay—Act XXI of 1870, s. 2.

death without children," to C. The words "in case of B's death without children" are to be understood as meaning in case B shall die without children during the lifetime of A.

(*e.*) A legacy is bequeathed to A for life, and after his death to B, and, "in case of B's death," to C. The words "in case of B's death" are to be considered as meaning in case B shall die in the lifetime of A."

See pp. 244, 245.

112. Where a bequest is made to such of certain persons as shall be surviving at some period, but the exact period is not specified, the legacy shall go to such of them as shall be alive at the time of payment or distribution, unless a contrary intention appear by the will.

Illustrations.

(*a.*) Property is bequeathed to A and B, to be equally divided between them, or to the survivor of them. If both A and B survive the testator, the legacy is equally divided between them. If A dies before the testator, and B survives the testator, it goes to B.

(*b.*) Property is bequeathed to A for life, and after his death to B and C, to be equally divided between them, or to the survivor of them. B dies during the life of A; C survives A. At A's death the legacy goes to C.

(*c.*) Property is bequeathed to A for life, and after his death to B and C, or the survivor, with a direction that, if B should not survive the testator, his children are to stand in his place. C dies during the life of the testator; B survives the testator, but dies in the lifetime of A. The legacy goes to the representative of B.

(*d.*) Property is bequeathed to A for life, and after his death to B and C, with a direction that, in case either of them dies in the lifetime of A, the whole shall go to the survivor. B dies in the lifetime of A. Afterwards C dies in the lifetime of A. The legacy goes to the representative of C.

See pp. 249, 250, 251.

PART XVI.*

OF CONDITIONAL BEQUESTS.

113. A bequest upon an impossible condition is void.

Illustrations.

(*a.*) An estate is bequeathed to A on condition that he shall walk one hundred miles in an hour. The bequest is void.

(*b.*) A bequeaths 500 rupees to B on condition that he shall marry A's daughter. A's daughter was dead at the date of the will. The bequest is void.

See pp. 253, 254.

114. A bequest upon a condition, the fulfilment of which would be contrary to law or to morality, is void.

Illustrations.

(*a.*) A bequeaths 500 rupees to B on condition that he shall murder C. The bequest is void.

(*b.*) A bequeaths 5,000 rupees to his niece if she will desert her husband. The bequest is void.

See p. 254.

115. Where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with.

Illustrations.

(*a.*) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, D and E. A marries with the written consent of B. C is present at the marriage. D sends a present to A previous to the marriage. E has been personally informed by A of his intentions, and has made no objection. A has fulfilled the condition.

(*b.*) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. D dies. A marries with the consent of B and C. A has fulfilled the condition.

(*c.*) A legacy is bequeathed to A on condition that he shall marry with the consent of B,

* This part applies to the wills of Hindus in the Lower Provinces of Bengal and in the Towns of Madras and Bombay—Act XXI of 1870, s 2.

C and D A marries in the lifetime of B, C and D, with the consent of B and C only. A has not fulfilled the condition.

(*d.*) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A obtains the unconditional assent of B, C and D to his marriage with E Afterwards B, C and D capriciously retract their consent. A marries E. A has fulfilled the condition.

(*e.*) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries without the consent of B, C and D, but obtains their consent after the marriage. A has not fulfilled the condition.

(*f*) A makes his will, whereby he bequeaths a sum of money to B if B shall marry with the consent of A's executors. B marries during the lifetime of A, and A afterwards expresses his approbation of the marriage. A dies. The bequest to B takes effect.

(*g*) A legacy is bequeathed to A if he executes a certain document within a time specified in the will. The document is executed by A within a reasonable time, but not within the time specified in the will. A has not performed the condition, and is not entitled to receive the legacy.

See pp. 255, 256, 257.

116. Where there is a bequest to one person and a bequest of the same thing to another if the prior bequest shall fail, the second bequest shall take effect upon the failure of the prior bequest, although the failure may not have occurred in the manner contemplated by the testator.

Illustrations.

(*a.*) A bequeaths a sum of money to his own children surviving him, and if they all die under 18, to B. A dies without having ever had a child. The bequest to B takes effect.

(*b.*) A bequeaths a sum of money to B, on condition that he shall execute a certain document within three months after A's death, and if he should neglect to do so, to C. B dies in the testator's lifetime. The bequest to C takes effect.

See pp. 257, 258.

117. Where the will shows in intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest shall not take effect unless the prior bequest fails in that particular manner.

Illustration.

A makes a bequest to his wife, but in case she should die in his lifetime, bequeaths to B that which he had bequeathed to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The bequest to B does not take effect.

See p 258.

118. A bequest may be made to any person with the condition superadded that in case a specified uncertain event shall happen, the thing bequeathed shall go to another person; or, that in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person.

In each case the ulterior bequest is subject to the rules contained in sections 107, 108, 109, 110, 111, 112, 113, 114, 116, 117.

Illustraitons.

(*a.*) A sum of money is bequeathed to A, to be paid to him at the age of 18, and if he shall die before he attains that age, to B. A takes a vested interest in the legacy, subject to be devested and to go to B in case A shall die under 18.

(*b.*) An estate is bequeathed to A with a proviso that if A shall dispute the competency of the testator to make a will, the estate shall go to B. A disputes the competency of the testator to make a will. The estate goes to B.

(*c.*) A sum of money is bequeathed to A for life, and after his death to B, but if B shall then be dead, leaving a son, such son is to stand in the place of B. B takes a vested interest in the legacy, subject to be divested if he dies leaving a son in A's lifetime.

(*d.*) A sum of money is bequeathed to A and B, and if either should die during the life of C, then to the survivor living at the death of C. A and B die before C. The gift over cannot take effect, but the representative of A takes one-half of the money, and the representative of B takes the other half.

(*e.*) A bequeaths to B the interest of a fund for life, and directs the fund to be divided, at her death, equally among her three children, or such of them as shall be living at her death. All the children of B die in B's lifetime. The bequest over cannot take effect, but the interests of the children pass to their representatives.

See p. 261.

119. An ulterior bequest of the kind contemplated by the last preceding section cannot take effect, unless the condition is strictly fulfilled.

Illustrations.

(*a.*) A legacy is bequeathed to A, with a proviso that, if he marries without the consent of B, C and D, the legacy shall go to E. D dies. Even if A marries without the consent of B and C, the gift to E does not take effect.

(*b.*) A legacy is bequeathed to A, with a proviso that, if he marries without the consent of B, the legacy shall go to C. A marries with the consent of B. He afterwards becomes a widower and marries again without the consent of B. The bequest to C does not take effect.

(*c.*) A legacy is bequeathed to A, to be paid at 18, or marriage, with a proviso that, if A dies under 18, or marries without the consent of B, the legacy shall go to C. A marries under 18, without the consent of B. The bequest to C takes effect.

See p. 262.

120. If the ulterior bequest be not valid, the original bequest is not affected by it.

Illustrations.

(*a.*) An estate is bequeathed to A for his life, with a condition superadded that if he shall not on a given day walk 100 miles in an hour, the estate shall go to B. The condition being void, A retains his estate as if no condition had been inserted in the will.

(*b.*) An estate is bequeathed, to A for her life, and if she do not desert her husband, to B. A is entitled to the estate during her life as if no condition had been inserted in the will.

(*c.*) An estate is bequeathed to A for life, and, if he marries, to the eldest son of B for life. B, at the date of the testator's death, had not had a son. The bequest over is void under section 92, and A is entitled to the estate during his life.

See p. 260.

121. A bequest may be made with the condition superadded that it shall cease to have effect in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations.

(*a.*) An estate is bequeathed to A for his life, with a proviso that, in case he shall cut down a certain wood, the bequest shall cease to have any effect. A cuts down the wood; he loses his life-interest in the estate.

(*b.*) An estate is bequeathed to A, provided that, if he marries under the age of 25 without the consent of the executors named in the will, the estate shall cease to belong to him. A marries under 25 without the consent of the executors. The estate ceases to belong to him.

(*c*) An estate is bequeathed to A, provided that, if he shall not go to England within three years after the testator's death, his interest in the estate shall cease. A does not go to England within the time prescribed. His interest in the estate ceases.

(*d.*) An estate is bequeathed to A, with a proviso that, if she becomes a Nun, she shall cease to have any interest in the estate. A becomes a Nun. She loses her interest under the will.

(*e.*) A fund is bequeathed to A for life, and after his death to B, if B shall be then living, with a proviso that, if B shall become a Nun, the bequest to her shall cease to have any effect. B becomes a Nun in the lifetime of A. She thereby loses her contingent interest in the fund.

See pp. 262, 263.

122. In order that a condition that a bequest shall cease to have effect may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of a bequest as contemplated by the one hundred and seventh section.

123. Where a bequest is made with a condition superadded that unless the legatee shall perform a certain act, the subject-matter of the bequest shall go to another person, or the bequest shall cease to have effect; but no time is specified for the performance of the act; if the legatee takes any step which renders impossible or indefinitely postpones the performance of the act required, the legacy shall go as if the legatee had died without performing such act.

Illustrations.

(*a*) A bequest is made to A with a proviso that, unless he enters the army, the legacy shall go over to B. A takes holy orders, and thereby renders it impossible that he should fulfil the condition. B is entitled to receive the legacy.

(*b.*) A bequest is made to A with a proviso that it shall cease to have any effect if he does not marry B's daughter. A marries a stranger, and thereby indefinitely postpones the fulfilment of the condition. The bequest ceases to have effect.

See p. 268.

124. Where the will requires an act to be performed by the legatee within a specified time, either as a condition to be fulfilled before the legacy is enjoyed, or as a condition upon

the non-fulfilment of which the subject-matter of the bequest is to go over to another person, or the bequest is to cease to have effect; the act must be performed within the time specified, unless the performance of it be prevented by fraud, in which case such further time shall be allowed as shall be requisite to make up for the delay caused by such fraud.

See p. 264.

PART XVII.*

OF BEQUESTS WITH DIRECTIONS AS TO APPLICATION OR ENJOYMENT.

125. Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction.

Illustration.

A sum of money is bequeathed towardf purchasing a country-residence for A, or to purchase an annuity for A, or to purchase a commission in the army for A, or to place A in any business. A chooses to receive the legacy in money. He is entitled to do so.

See pp. 52, 265.

126. Where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee; if that benefit cannot be obtained for the legatee, the fund belongs to him as if the will had contained no such direction.

Illustrations.

(*a.*) A bequeaths the residue of his property to be divided equally among his daughters, and directs that the shares of the daughters shall be settled upon themselves respectively for life, and be paid to their children after their death. All the daughters die unmarried: the representatives of each daughter are entitled to her share of the residue.

(*b.*) A directs his trustees to raise a sum of money for his daughter, and he then directs that they shall invest the fund, and pay the income arising from it to her during her life, and divide the principal among her children after her death. The daughter dies without having ever had a child. Her representatives are entitled to the fund.

See pp. 265, 266.

127. Where a testator does not absolutely bequeath a fund, so as to sever it from his own estate, but gives it for certain purposes, and part of those purposes cannot be fulfilled, the fund, or so much of it as has not been exhausted upon the objects contemplated by the will, remains a part of the estate of the testator.

Illustrations.

(*a.*) A directs that his trustees shall invest a sum of money in a particular way, and shall pay the interest to his son for life, and at his death shall divide the principal among his children; the son dies without having ever had a child. The fund, after the son's death, belongs to the estate of the testator.

(*b.*) A bequeaths the residue of his estate to be divided equally among his daughters, with a direction that they are to have the interest only during their lives, and that at their decease the fund shall go to their children. The daughters have no children. The fund belongs to the estate of the testator.

See pp. 52, 266, 267.

PART XVIII.†

OF BEQUESTS TO AN EXECUTOR.

128. If a legacy is bequeathed to a person who is named an executor of the will, he shall not take the legacy unless he proves the will or otherwise manifests an intention to act as executor.

* This part applies to the wills of Hindus in the Lower Provinces of Bengal and in the towns of Madras and Bombay—Act XXI of 1870, s. 2.

† This part applies to the wills of Hindus in the Lower Provinces of Bengal and in the towns of Madras and Bombay—Act XXI of 1870, s. 2.

Illustration.

A legacy is given to A, who is named an executor. A orders the funeral according to the directions contained in the will, and dies a few days after the testator, without having proved the will. A has manifested an intention to act as executor.

See pp. 273, 274.

PART XIX.*

OF SPECIFIC LEGACIES.

129. Where a testator bequeaths to any person a specified part of his property, which is distinguished from all other parts of his property, the legacy is said to be specific.

Illustrations.

(*a.*) A bequeaths to B—

"the diamond-ring presented to him by C:"
"his gold chain:"
"a certain bale of wool:"
"a certain piece of cloth:"
"all his household goods, which shall be in or about his dwelling-house in M Street, in Calcutta, at the time of his death:"
"the sum of 1,000 rupees in a certain chest:"
"the debt which B owes him:"
"all his bills, bonds and securities belonging to him, lying in his lodgings in Calcutta:"
"all his furniture in his house in Calcutta:"
"all his goods on board a certain ship then lying in the river Hugli:"
"2,000 rupees which he has in the hands of C:"
"the money due to him on the bond of D:"
"his mortgage on the Rampur factory:"
"one-half of the money owing to him on his mortgage of Rampur factory:"
"1,000 rupees, being part of a debt due to him from C:"
"his capital stock of 1,000*l.* in East India Stock:"
"his promissory notes of the Government of India for 10,000 rupees in their 4 per cent. loan:"
"all such sums of money as his executors may, after his death, receive in respect of the debt due to him from the insolvent firm of D and Company:"
"all the wine which he may have in his cellar at the time of his death:"
"such of his horses as B may select:"
"all his shares in the Bank of Bengal:"
"all the shares in the Bank of Bengal" which he may possess at the time of his death:"
"all the money which he has in the 5½ per cent. loan of the Government of India:"
"all the Government-securities he shall be entitled to at the time of his decease."

Each of these legacies is specific.

(*b.*) A having Government promissory notes for 10,000 rupees, bequeaths to his executors "Government promissory notes for 10,000 rupees in trust to sell" for the benefit of B.

The legacy is specific.

(*c.*) A having property at Benares, and also in other places, bequeaths to B all his property at Benares.

The legacy is specific.

(*d.*) A bequeaths to B—

his house in Calcutta:
his zamindari of Rampur:
his taluq of Ramnagar:
his lease of the Indigo-factory of Salkya:
an annuity of 500 rupees out of the rents of his zamindari of W.

A directs his zamindari of X to be sold, and the proceeds to be invested for the benefit of B.

* This part applies to the wills of Hindus in the Lower Provinces of Bengal and in the towns of Madras and Bombay—Act XXI of 1870, s. 2.

Each of these bequests is specific.

(*e.*) A by his will charges his zamindari of Y with an annuity of 1,000 rupees to C during his life, and subject to this charge he bequeaths the zamindari to D. Each of these bequests is specific.

(*f.*) A bequeaths a sum of money—

to buy a house in Calcutta for B:
to buy an estate in zila Faridpur for B:
to buy a diamond ring for B:
to buy a horse for B:
to be invested in shares in the Bank of Bengal for B:
to be invested in Government-securities for B.

A bequeaths to B—

"a diamond-ring:"
"a horse:"
"10,000 rupees worth of Government-securities:"
"an annuity of 500 rupees:"
"2,000 rupees, to be paid in cash:"
"so much money as will produce 5,000 rupees 4 per cent. Government-securities."

These bequests are not specific.

(*g.*) A, having property in England and property in India, bequeaths a legacy to B, and directs that it shall be paid out of the property which he may leave in India. He also bequeaths a legacy to C, and directs that it shall be paid out of the property which he may leave in England.

No one of these legacies is specific.

See pp. 190, 276, 278, 279.

130. Where a sum certain is bequeathed, the legacy is not specific merely because the stocks, funds or securities in which it is invested are described in the will.

Illustration.

A bequeaths to B—

"10,000 rupees of his funded property:"
"10,000 rupees of his property now invested in shares of the East Indian Railway Company:"
"10,000 rupees, at present secured by mortgage of Rampur factory."

No one of these legacies is specific.

See p. 279.

131. Where a bequest is made in general terms, of a certain amount of any kind of stock, the legacy is not specific merely because the testator was, at the date of his will, possessed of stock of the specified kind, to an equal or greater amount than the amount bequeathed.

Illustration.

A bequeaths to B 5,000 rupees five per cent. Government securities. A had at the date of the will five per cent Government securities for 5,000 rupees.

The legacy is not specific.

See pp. 279, 280.

132. A money-legacy is not specific merely because the will directs its payment to be postponed until some part of the property of the testator shall have been reduced to a certain form, or remitted to a certain place.

Illustration.

A bequeaths to B 10,000 rupees, and directs that this legacy shall be paid as soon as A's property in India shall be realized in England.

The legacy is not specific.

See p. 280.

133. Where a will contains a bequest of the residue of the testator's property along with an enumeration of some items of property not previously bequeathed, the articles enumerated shall not be deemed to be specifically bequeathed.

See p. 281.

134. Where property is specifically bequeathed to two or more persons in succession, it shall be retained in the form in which the testator left it, although it may be of such a nature that its value is continually decreasing.

Illustrations.

(*a.*) A, having a lease of a house for a term of years, 15 of which were unexpired at the time of his death, has bequeathed the lease to B for his life, and after B's death to C. B is

to enjoy the property as A left it, although, if B lives for 15 years, C can take nothing under the bequest.

(b.) A, having an annuity during the life of B, bequeaths it to C for his life, and after C's death, to D. C is to enjoy the annuity as A left it, although, if B dies before D, D can take nothing under the bequest.

See p. 281.

135. Where property comprised in a bequest to two or more persons in succession, is not specifically bequeathed, it shall, in the absence of any direction to the contrary, be sold, and the proceeds of the sale shall be invested in such securities as the High Court may, by any general rule to be made from time to time, authorize or direct, and the fund thus constituted shall be enjoyed by the successive legatees according to the terms of the will.

Illustration.

A, having a lease for a term of years, bequeaths "all his property" to B for life, and after B's death, to C. The lease must be sold, and the proceeds invested as stated in the text, and the annual income arising from the fund is to be paid to B for life. At B's death the capital of the fund is to be paid to C.

See p. 281.

136 If there be a deficiency of assets to pay legacies, a specific legacy is not liable to abate with the general legacies.

See p. 276.

PART XX.*

OF DEMONSTRATIVE LEGACIES.

137. Where a testator bequeaths a certain sum of money, or a certain quantity of any other commodity, and refers to a particular fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative.

Explanation.—The distinction between a specific legacy and a demonstrative legacy consists in this, that

where specified property is given to the legatee, the legacy is specific;

where the legacy is directed to be paid out of specified property, it is demonstrative.

Illustrations.

(a.) A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The legacy to B is specific; the legacy to C is demonstrative.

(b.) A bequeaths to B—

"ten bushels of the corn which shall grow in his field of Greenacre:"

"80 chests of the indigo which shall be made at his factory of Rampur:"

"10,000 rupees out of his five per cent. promissory notes of the Government of India:"

an annuity of 500 rupees "from his funded property:"

"1,000 rupees out of the sum of 2,000 rupees due to him by C."

A bequeaths to B an annuity, and directs it to be paid out of the rents arising from his taluq of Ramnagar.

A bequeaths to B—

"10,000 rupees out of his estate at Ramnagar," or charges it on his state at Ramnagar:

"10,000 rupees, being his share of the capital embarked in a certain business."

Each of these bequests is demonstrative.

See pp. 276, 282.

138. Where a portion of a fund is specifically bequeathed and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee, and the demonstrative legacy shall be paid out of the residue of the fund, and, so far as the residue shall be deficient, out of the general assets of the testator.

Illustrations.

A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also

* This part applies to the wills of Hindus, &c., in the Lower Provinces and in the towns of Madras and Bombay, see Act No. XXI of 1870.

bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The debt due to A from W is only 1,500 rupees; of these 1,500 rupees, 1,000 rupees belong to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator.

See p. 282.

PART XXI.*

OF ADEMPTION OF LEGACIES.

139. If anything which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is adeemed; that is, it cannot take effect by reason of the subject-matter having been withdrawn from the operation of the will.

Illustrations.

(*a.*) A bequeaths to B—

"the diamond-ring presented to him by C:"

"his gold chain:"

"a certain bale of wool:"

"a certain piece of cloth:"

"all his household-goods which shall be in or about his dwelling-house in M Street, in Calcutta, at the time of his death.

A, in his lifetime,

sells or gives away the ring:

converts the chain into a cup:

converts the wool into cloth:

makes the cloth into a garment:

takes another house into which he removes all his goods.

Each of these legacies is adeemed.

(*b.*) A bequeaths to B—

"the sum of 1,000 rupees in a certain chest:"

"all the horses in his stable."

At the death of A, no money is found in the chest, and no horses in the stable.

The legacies are adeemed.

(*c.*) A bequeaths to B certain bales of goods. A takes the goods with him on a voyage. The ship and goods are lost at sea, and A is drowned.

The legacy is adeemed.

See pp. 276, 283.

140. A demonstrative legacy is not adeemed by reason that the property on which it is charged by the will does not exist at the time of the death of the testator, or has been converted into property of a different kind; but it shall in such case be paid out of the general assets of the testator.

See pp. 282, 284.

141. Where the thing specifically bequeathed is the right to receive something of value from a third party, and the testator himself receives it, the bequest is adeemed.

Illustrations.

(*a.*) A bequeaths to B—

"the debt which C owes him:"

"2,000 rupees which he has in the hands of D:"

"the money due to him on the bond of E:"

"his mortgage on the Rampur factory."

All these debts are extinguished in A's lifetime, some with and some without his consent.

All the legacies are adeemed.

(*b.*) A bequeaths to B—

"his interest in certain policies of life assurance."

A in his lifetime receives the amount of the policies. The legacy is adeemed.

See p. 287.

142. The receipt by the testator of a part of an entire thing specifically bequeathed shall operate as an ademption of the legacy to the extent of the sum so received.

* This Part applies to the wills of Hindus, &c., in the Lower Provinces and in the towns of Madras and Bombay, see Act No. XXI of 1870.

Illustration.

A bequeaths to B "the debt due to him by C." The debts amounts to 10,000 rupees. C pays to A 5,000 rupees, the one-half of the debt. The legacy is revoked by ademption, so far as regards the 5,000 rupees received by A.

See p. 288.

143. If a portion of an entire fund or stock be specifically bequeathed, the receipt by the testator of a portion of the fund or stock shall operate as an ademption only to the extent of the amount so received; and the residue of the fund or stock shall be applicable to the discharge of the specific legacy.

Illustration.

A bequeaths to B one-half of the sum of 10,000 rupees due to him from W. A in his lifetime receives 6,000 rupees, part of the 10,000 rupees. The 4,000 rupees which are due from W to A at the time of his death belong to B under the specific bequest.

See p. 288.

144. Where a portion of a fund is specifically bequeathed to one legatee, and a legacy charged on the same fund is bequeathed to another legatee; if the testator receives a portion of that fund, and the remainder of the fund is insufficient to pay both the specific and the demonstrative legacy, the specific legacy shall be paid first, and the residue (if any) of the fund shall be applied so far as it will extend in payment of the demonstrative legacy, and the rest of the demonstrative legacy shall be paid out of the general assets of the testator.

Illustration.

A bequeaths to B 1,000 rupees, part of the debt of 2,000 rupees due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. A afterwards receives 500 rupees, part of that debt, and dies leaving only 1,500 rupees due to him from W. Of these 1,500 rupees, 1,000 rupees belong to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator.

See p. 288.

145. Where stock which has been specifically bequeathed does not exist at the testator's death, the legacy is adeemed.

Illustration.

A bequeaths to B—

"his capital stock of 1,000*l.* in East India Stock:"

"his promissory notes of the Government of India for 10,000 rupees in their 4 per cent. loan."

A sells the stock and the notes.

The legacies are adeemed.

See p. 284.

146. Where stock, which has been specifically bequeathed, does only in part exist at the testator's death, the legacy is adeemed so far as regards that part of the stock which has ceased to exist.

Illustration.

A bequeaths to B—

"his 10,000 rupees in the 5½ per cent. loan of the Government of India."

A sells one-half of his 10,000 ruppes in the loan in question.

One-half of the legacy is adeemed.

See pp. 284, 405.

147. A specific bequest of goods under a description connecting them with a certain place, is not adeemed by reason that they have been removed from such place from any temporary cause, or by fraud, or without the knowledge or sanction of the testator.

Illustrations.

A bequeaths to B "all his household goods which shall be in or about his dwelling-house in Calcutta at the time of his death." The goods are removed from the house to save them from fire. A dies before they are brought back.

A bequeaths to B "all his household goods which shall be in are about his dwelling-house in Calcutta at the time of his death." During A's absence upon a journey, the whole of the goods are removed from the house. A dies without having sanctioned their removal.

Neither of these legacies is adeemed.

See p. 287.

148. The removal of the thing bequeathed from the place in which it is stated in the will to be situated, does not constitute an ademption, where the place is only referred to in order to complete the description of what the testator meant to bequeath.

Illustrations.

A bequeaths to B all the bills, bonds and other securities for money belonging to him then lying in his lodgings in Calcutta. At the time of his death, these effects had been removed from his lodgings in Calcutta.

A bequeaths to B all his furniture then in his house in Calcutta. The testator has a house at Calcutta and another at Chinsurah, in which he lives alternately, being possessed of one set of furniture only, which he removes with himself to each house. At the time of his death, the furniture is in the house at Chinsurah.

A bequeaths to B all his goods on board a certain ship then lying in the river Hugli. The goods are removed by A's directions to a warehouse, in which they remain at the time of A's death.

No one of these legacies is revoked by ademption.

See p. 287.

149. Where the thing bequeathed is not the right to receive something of value from a third person, but the money or other commodity which shall be received from the third person by the testator himself or by his representatives, the receipt of such sum of money or other commodity by the testator shall not constitute an ademption;

but if he mixes it up with the general mass of his property, the legacy is adeemed.

Illustration.

A bequeaths to B whatever sum may be received from his claim on C. A receives the whole of his claim on C, and sets it apart from the general mass of his property. The legacy is not adeemed.

See p. 288.

150. Where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place by operation of law, or in the course of execution of the provisions of any legal instrument under which the thing bequeathed was held, the legacy is not adeemed by reason of such change.

Illustrations.

A bequeaths to B "all the money which he has in the 5½ per cent. loan of the Government of India."

The securities for the 5½ per cent. loan are converted during A's lifetime into 5 per cent. stock.

A bequeaths to B the sum of 2,000*l.*, invested in Consols in the names of trus-tees for A.

The sum of 2,000*l.* is transferred by the trustees into A's own name.

A bequeaths to B the sum of 10,000 rupees in promissory notes of the Government of India which he has power, under his marriage-settlement, to dispose of by will. Afterwards, in A's lifetime, the fund is converted into Consols by virtue of an authority contained in the settlement.

No one of these legacies has been adeemed.

See p. 286.

151. Where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death and the change takes place without the knowledge or sanction of the testator, the legacy is not adeemed.

Illustration.

A bequeaths to B "all his 3 per cent. Consols." The Consols are, without A's knowledge, sold by his agent, and the proceeds converted into East India Stock. This legacy is not adeemed.

152. Where stock which has been specifically bequeathed is lent to a third party on condition that it shall be replaced, and it is replaced accordingly, the legacy is not adeemed.

153. Where stock specifically bequeathed is sold, and an equal quantity of the same stock is afterwards purchased and belongs to the testator at his death, the legacy is not adeemed.

See p. 285.

PART XXII.*

OF THE PAYMENT OF LIABILITIES IN RESPECT OF THE SUBJECT OF A BEQUEST.

154. Where property specifically bequeathed is subject at the death of the testator to any pledge, lien or incumbrance, created by the testator himself or by any person under whom he claims; then, unless a contrary intention appears by the will, the legatee, if he accepts the bequest, shall accept it subject to such pledge or incumbrance, and shall (as between himself and the testator's estate) be liable to make good the amount of such pledge or incumbrance.

A contrary intention shall not be inferred from any direction which the will may contain for the payment of the testator's debts generally.

Explanation.—A periodical payment in the nature of land-revenue or in the nature of rent is not such an incumbrance as is contemplated by this section.

Illustrations.

(*a.*) A bequeaths to B the diamond-ring given him by C. At A's death the ring is held in pawn by D, to whom it has been pledged by A. It is the duty of A's executors, if the state of the testator's assets will allow them, to allow B to redeem the ring.

(*b.*) A bequeaths to B a zamindari, which at A's death is subject to a mortgage for 10,000 rupees, and the whole of the principal sum, together with interest to the amount of 1,000 rupees, is due at A's death. B, if he accepts the bequest, accepts it subject to this charge, and is liable, as between himself and A' estate, to pay the sum of 11,000 rupees thus due.

See pp. 290, 292.

155. Where any thing is to be done to complete the testator's title to the thing bequeathed, it is to be done at the cost of the testator's estate.

Illustrations.

(*a.*) A, having contracted in general terms for the purchase of a piece of land at a certain price, bequeaths it to B, and dies before he has paid the purchase-money. The purchase-money must be made good out of A's assets.

(*b.*) A, having contracted for the purchase of a piece of land for a certain sum of money, one-half of which is to be paid down, and the other half secured by mortgage of the land, bequeaths it to B, and dies before he has paid or secured any part of the purchase-money. One-half of the purchase-money must be paid out of A's assets.

See p. 293.

156. Where there is a bequest of any interest in immoveable property, in respect of which payment in the nature of land-revenue or in the nature of rent has to be made periodically, the estate of the testator shall (as between such estate and the legatee) make good such payments or a proportion of them up to the day of his death.

Illustration.

A bequeaths to B a house, in respect of which 365 rupees are payable annually by way of rent. A pays his rent at the usual time, and dies 25 days after. A's estate shall make good 25 rupees in respect of the rent.

See p. 293.

157. In the absence of any direction in the will, where there is a specific bequest of stock in a Joint Stock Company, if any call or other payment is due from the testator at the time of his death in respect of such stock, such call or payment shall, as between the testator's estate and the legatee, be borne by such estate;

but if any call or other payment shall, after the testator's death, become due in respect of such stock, the same shall, as between the testator's estate and the legatee, be borne by the legatee if he accept the bequest.

Illustrations.

(*a.*) A bequeathed to B his shares in a certain railway. At A's death there was due from him the sum of 5*l.* in respect of each share, being the amount of a call which had been duly made, and the sum of 5*s.* in respect of each share, being the amount of interest which had accrued due in respect of the call. These payments must be borne by A's estate.

* This Part applies to the wills of Hindus, &c., in the Lower Provinces and in the towns of Madras and Bombay, see Act No. XXI of 1870.

(*b.*) A has agreed to take 50 shares in an intended Joint Stock Company, and has contracted to pay up 5*l.* in respect of each share, which sum must be paid before his title to the shares can be completed. A bequeaths these shares to B. The estate of A must make good the payments which were necessary to complete A's title.

(*c.*) A bequeaths to B his shares in a certain railway. B accepts the legacy. After A's death, a call is made in respect of the shares. B must pay the call.

(*d.*) A bequeaths to B his shares in a Joint Stock Company. B accepts the bequest. Afterwards the affairs of the Company are wound up, and each shareholder is called upon for contribution. The amount of the contribution must be borne by the legatee.

(*e.*) A is the owner of ten shares in a Railway Company. At a meeting held during his lifetime a call is made of 3*l.* per share, payable by three instalments. A bequeaths his shares to B, and dies between the day fixed for the payment of the first and the day fixed for the payment of the second instalment, and without having paid the first instalment. A's estate must pay the first instalment, and B, if he accepts the legacy, must pay the remaining instalments.

See pp. 293, 294.

PART XXIII.*

OF BEQUESTS OF THINGS DESCRIBED IN GENERAL TERMS.

158. If there be a bequest of something described in general terms, the executor must purchase for the legatee what may reasonably be considered to answer the description.

Illustrations.

(*a.*) A bequeaths to B *a* pair of carriage-horses, or *a* diamond-ring. The executor must provide the legatee with such articles, if the state of the assets will allow it.

(*b.*) A bequeaths to B "*his* pair of carriage-horses." A had no carriage-horses at the time of his death. The legacy fails.

See p. 289.

PART XXIV.†

OF BEQUESTS OF THE INTEREST OR PRODUCE OF A FUND.

159. Where the interest or produce of a fund is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal as well as the interest shall belong to the legatee.

See pp. 294, 295.

Illustration.

(*a.*) A bequeaths to B the interest of his five per cent. promissory notes of the Government of India. There is no other clause in the will affecting those securities. B is entitled to A's five per cent. promissory notes of the Government of India.

(*b.*) A bequeaths the interest of 5½ per cent. promissory notes of the Government of India to B for his life, and after his death to C. B is entitled to the interest of the notes during his life; and C is entitled to the notes upon B's death.

(*c.*) A bequeaths to B the rents of his lands at X. B is entitled to the lands.

See pp. 294, 295.

PART XXV.‡

OF BEQUESTS OF ANNUITIES.

160. Where an annuity is created by will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the will. And this rule shall not be varied by

* This Part applies to the wills of Hindus, &c., in the Lower Provinces and in the towns of Madras and Bombay, see Act No. XXI of 1870.

† This Part applies to the wills of Hindus, &c., in the Lower Provinces and in the towns of Madras and Bombay, see Act No. XXI of 1870.

‡ This Part applies to the wills of Hindus, &c. in the Lower Provinces and in the towns of Madras and Bombay, see Act No. XXI of 1870.

the circumstance that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it.

Illustrations.

(*a.*) A bequeaths to B 500 rupees a year. B is entitled during his life to receive the annual sum of 500 rupees.

(*b.*) A bequeaths to B the sum of 500 rupees monthly. B is entitled during his life to receive the sum of 500 rupees every month.

(*c.*) A bequeaths an annuity of 500 rupees to B for life, and on B's death to C. B is entitled to an annuity of 500 rupees during his life. C, if he survives B, is entitled to annuity of 500 rupees from B's death until his own death.

See pp. 173, 296, 297.

161. Where the will directs that an annuity shall be provided for any person out of the proceeds of property, or out of property generally, or where money is bequeathed to be invested in the purchase of any annuity for any person, on the testator's death the legacy vests in interest in the legatee, and he is entitled at his option to have an annuity purchased for him, or to receive the money appropriated for that purpose by the will.

Illustrations.

(*a.*) A by his will directs that his executors shall out of his property purchase an annuity of 1,000 rupees for B. B is entitled at his option to have an annuity of 1,000 rupees for his life purchased for him, or to receive such a sum as will be sufficient for the purchase of such an annuity.

(*b.*) A bequeaths a fund to B for his life, and directs that after B's death it shall be laid out in the purchase of an annuity for C. B and C survive the testator. C dies in B's lifetime. On B's death the fund belongs to the representative of C.

See p. 298.

162. Where an annuity is bequeathed, but the assets of the testator are not sufficient to pay all the legacies given by the will, the annuity shall abate in the same proportion as the other pecuniary legacies given by the will.

See p. 300.

163. Where there is a gift of an annuity and a residuary gift, the whole of the annuity is to be satisfied before any part of the residue is paid to the residuary legatee, and, if necessary, the capital of the testator's estate shall be applied for that purpose.

See p. 300.

PART XXVI.*

OF LEGACIES TO CREDITORS AND PORTIONERS.

164. Where a debtor bequeaths a legacy to his creditor, and it does not appear from the will that the legacy is meant as a satisfaction of the debt, the creditor shall be entitled to the legacy as well as to the amount of the debt.

See p. 302.

165. Where a parent who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy as well as the portion.

Illustration.

A, by articles entered into in contemplation of his marriage with B, covenanted that he would pay to each of the daughters of the intended marriage a portion of 20,000 rupees on her marriage. This covenant having been broken, A bequeaths 20,000 rupees to each of the married daughters of himself and B. The legatees are entitled to the benefit of this bequest in addition to their portions.

See p. 302.

166. No bequest shall be wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee.

* This Part applies to the wills of Hindus, &c., in the Lower Provinces and in the towns of Madras and Bombay, see Act No. XXI of 1870.

Illustrations.

(*a.*) A bequeaths 20,000 rupees to his son B. He afterwards gives to B the sum of 20,000 rupees. The legacy is not thereby adeemed.

(*b.*) A bequeaths 40,000 rupees to B, his orphan-niece whom he had brought up from her infancy. Afterwards, on the occasion of B's marriage, A settles upon her the sum of 30,000 rupees. The legacy is not thereby diminished.

See p. 302.

PART XXVII.*

OF ELECTION.

167. Where a man, by his will, professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and in the latter case he shall give up any benefits which may have been provided for him by the will.

See p. 303.

168. The interest so relinquished shall devolve as if it had not been disposed of by the will in favour of the legatee, subject, nevertheless to the charge of making good to the disappointed legatee the amount or value of the gift attempted to be given to him by the will.

See p. 303.

169. This rule will apply whether the testator does or does not believe that which he professes to dispose of by his will to be his own.

Illustrations.

(*a.*) The farm of Sultanpur was the property of C. A bequeathed it to B, giving a legacy of 1,000 rupees to C. C has elected to retain his farm of Sultanpur, which is worth 800 rupees. C forfeits his legacy of 1,000 rupees, of which 800 rupees goes to B, and the remaining 200 rupees falls into the residuary bequest, or devolves according to the rules of intestate succession, as the case may be.

(*b.*) A bequeaths an estate to B in case B's elder brother (who is married and has children) shall leave no issue living at his death. A also bequeaths to C a jewel, which belongs to B. B must elect to give up the jewel, or to lose the estate.

(*c.*) A bequeaths to B 1,000 rupees, and to C an estate which will, under a settlement, belong to B if his elder brother (who is married and has children) shall leave no issue living at his death, B must elect to give up the estate, or to lose the legacy.

(*d.*) A, a person of the age of 18 domiciled in British India, but owning real property in England, to which C is heir-at-law, bequeaths a legacy to C, and, subject thereto, devises and bequeaths to B "all his property, whatsoever and wheresoever." and dies under 21. The real property in England does not pass by the will. C may claim his legacy without giving up the real property in England.

See pp. 304, 307.

170. A bequest for a man's benefit is, for the purpose of election, the same thing as a bequest made to himself.

Illustration.

The farm of Sultanpur Khurd being the property of B, A bequeathed it to C; and bequeathed another farm called Sultanpur Buzurg to his own executors, with a direction that it should be sold, and the proceeds applied in payment of B's debts. B must elect whether he will abide by the will, or keep his farm of Sultanpur Khurd in opposition to it.

See pp. 307, 308.

171. A person taking no benefit directly under the will, but deriving a benefit under it indirectly, is not put to his election.

Illustration.

The lands of Sultanpur are settled upon C for life, and after his death upon D, his only child. A bequeaths the lands of Sultanpur to B, and 1,000 rupees to C. C dies intestate, shortly after the testator, and without having made any election. D takes out administration to C, and as administrator elect on behalf of C's estate to take under the will. In that capacity he receives the legacy of 1,000 rupees, and accounts, to B for the rents of the lands of

* This Part applies to the wills of Hindus, &c., in the Lower Provinces and in the towns of Madras and Bombay, see Act No. XXI of 1807.

Sultanpur which accrued after the death of the testator and before the death of C. In his individual character he retains the lands of Sultanpur in opposition to the will.

See pp. 307, 308.

172. A person who in his individual capacity takes a benefit under the will may in another character elect to take in opposition to the will.

Illustration.

The estate of Sultanpur is settled upon A for life, and after his death upon B. A leaves the estate of Sultanpur to D, and 2,000 rupees to B, and 1,000 rupees to C, who is B's only child. B dies intestate, shortly after the testator, without having made an election. C takes out administration to B, and as administration elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of 2,000 rupees C may do this, and yet claim his legacy of 1,000 rupees under the will.

Exception to the six last Rules.—Where a particular gift is expressed in the will to be in lieu of something belonging to the legatee, which is also in terms disposed of by the will, if the legatee claims that thing, he must relinquish the particular gift, but he is not bound to relinquish any other benefit given to him by the will.

Illustration.

Under A's marriage-settlement his wife is entitled, if she survives him, to the enjoyment of the estate of Sultanpur during her life.

A by his will bequeaths to his wife an annuity of 200*l.* during her life, in lieu of her interest in the estate of Sultanpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1,000*l.* The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity, but not the legacy of 1,000*l.*

See p. 308.

173. Acceptance of a benefit given by the will constitutes an election by the legatee to take under the will, if he has knowledge of his right to elect, and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

Illustrations.

(*a.*) A is an owner of an estate called Sultanpur Khurd, and has a life-interest in another estate called Sultanpur Buzurg, to which upon his death, his son B will be absolutely entitled. The will of A gives the estate of Sultanpur Khurd to B, and the estate of Sultanpur Buzurg to C. B, in ignorance of his own right to the estate of Sultanpur Buzurg, allows C to take possession of it, and enters into possession of the estate of Sultanpur Khurd. B has not confirmed the bequest of Sultanpur Buzurg to C.

(*b.*) B, the eldest son of A, is the possessor af an estate called Sultanpur. A bequeaths Sultanpur to C, and to B the residue of A's property. B having been informed by A's executor that the residue will amount to 5,000 rupees, allows C to take possession of Sultanpur. He afterwards discovers that the residue does not amount to more than 500 rupees. B has not confirmed the bequest of the estate of Sultanpur to C.

See p. 306.

174. Such knowledge or waiver of inquiry shall, in the absence of evidence to the contrary, be presumed if the legatee has enjoyed for two years the benefits provided for him by the will without any act to express dissent.

See p. 306.

175. Such knowledge or waiver of inquiry may be inferred from any act of the legatee which renders it impossible to place the persons interested in the subject-matter of the bequest in the same condition as if such act had not been done.

Illustration.

A bequeaths to B an estate to which C is entitled, and to C a coal-mine. C takes possession of the mine, and exhausts it. He has thereby confirmed the bequest of the estate to B.

See p. 306.

176. If the legatee shall not, within one year after the death of the testator, signify to the testator's representatives his intention to confirm or to dissent from the will, the representatives shall, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the will.

See p. 309.

177. In case of disability the election shall be postponed until the disability ceases, or until the election shall be made by some competent authority.

See p. 309.

PART XXVIII.*

OF GIFTS IN CONTEMPLATION OF DEATH.

178. A man may dispose, by gift made in contemplation of death, of any moveable property which he could dispose of by will.

A gift is said to be made in contemplation of death where a man who is ill and expects to die shortly of his illness, delivers to another the possession of any moveable property to keep as a gift in case the donor shall die of that illness.

Such a gift may be resumed by the giver.

It does not take effect if he recovers from the illness during which it was made; nor if he survives the person to whom it was made.

Illustrations.

(*a.*) A being ill, and in expectation of death delivers to B, to be retained by him in case of A's death—

a watch:
a bond granted by C to A:
a bank-note:
a promissory note of the Government of India endorsed in blank:
a bill of exchange endorsed in blank:
certain mortgage-deeds.

A dies of the illness during which he delivered these articles.

B is entitled to—

the watch:
the debt secured by C's bond:
the bank-note:
the promissory note of the Government of India:
the bill of exchange:
the money secured by the mortgage-deeds.

(*b.*) A being ill, and in expectation of death, delivers to B the key of a trunk, or the key of a warehouse in which goods of bulk belonging to A are deposited, with the intention of giving him the control over the contents of the trunk, or over the deposited goods, and desires him to keep them in case of A's death. A dies of the illness during which he delivered these articles. B is entitled to the trunk and its contents, or to A's goods of bulk in the warehouse.

(*c.*) A being ill, and in expectation of death, puts aside certain articles in separate parcels, and marks upon the parcels respectively the name of B and C. The parcels, are not delivered during the life of A. A dies of the illness during which he set aside the parcels. B and C are not entitled to the contents of the parcels.

See pp. 309, 310.

PART XXIX.

OF GRANT OF PROBATE AND LETTERS OF ADMINISTRATION.

179. The executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such.†

See pp. 313, 323, 325, 343, 355, 369.

180. When a will has been proved and deposited in a Court of competent jurisdiction, situated beyond the limits of the Province, whether in the British dominions, or in a foreign country, and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed.

This is s. 5 of Act V of 1881. See pp. 322, 223.

* This Part does not apply to Hindus, see Act No. XXI. of 1870.

† Sections 179—189 both inclusive and ss. 191—199 both inclusive and Parts XXX and XXXI were made applicable to the wills of Hindus and in the Lower Provinces of Bengal and in the towns of Madras and Bombay by s. 2 of the Hindu Wills Act, XXI of 1870; but so much of that section as makes these sections and parts, with the exception of s. 187, (which is, therefore, still embodied in the Hindu Wills Act) so applicable has been repealed by s. 154 of the Probate and Administration Act.

S. 179 is incorporated as s. 4 in Act V of 1881.

181 Probate can be granted only to an executor appointed by the will.

This is section 6 of Act V of 1881. See pp. 274, 315.

182. The appointment may be express or by necessary implication.

Illustrations.

(*a.*) A wills that C be his executor if B will not; B is appointed executor by implication.

(*b.*) A gives a legacy to B and several legacies to other persons, among the rest to his daughter-in-law, C, and adds, "but should the within-named C be not living, I do constitute and appoint B my whole and sole executrix." C is appointed executrix by implication.

(*c.*) A appoints several persons executors of his will and codicils, and his nephew residuary legatee, and in another codicil are these words:—"I appoint my nephew my residuary legatee to discharge all lawful demands against my will and codicils, signed of different dates." The nephew is appointed an executor by implication.

This is s. 7 of Act V of 1881. See pp. 315, 318.

183. Probate cannot be granted to any person who is a minor or is of unsound mind, nor to a married woman without the previous consent of her husband.

This section omitting the last clause is s. 8 of Act V of 1881. See pp. 315, 316, 317, 372.

184. When several executors are appointed, probate may be granted to them all simultaneously or at different times.

Illustration.

A is an executor of B's will by express appointment, and C an executor of it by implication. Probate may be granted to A and C at the same time, or to A first and then to C, or to C first and then to A.

This is s. 9 of Act V. of 1881. See p. 320.

185. If a codicil be discovered after the grant of probate, a separate probate of that codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the will.

If different executors are appointed by the codicil, the probate of the will must be revoked, and a new probate granted of the will and the codicil together.

This is s. 10 of Act V. of 1881. See pp. 321, 346.

186. When probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors.

This is section 11 of Act V of 1881. See p. 322.

187. No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the Province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under the one hundred and eightieth section.

This section has not been incorporated in Act V of 1881 but it is still embodied in the Hindu Wills Act and therefore only applies to wills of persons to whom the Indian Succession Act and that Act apply. See s. 154 of Act V of 1881. See pp. 322, 323, 370.

188. Probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such.

This is s. 12 of Act V of 1881. See p. 324.

189. Letters of administration cannot be granted to any person who is a minor or is of unsound mind, nor to a married woman without the previous consent of her husband.

Omitting the last clause, this is s. 13 of Act V of 1881. See p. 331.

190. No right to any part of the property of a person who has died intestate can be established in any Court of Justice unless letters of administration have first been granted by a Court of competent jurisdiction.

This section has not been incorporated in Act V of 1881. See Act VII of 1889, s. 21. See pp. 311, 323.

191. Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death.

This is s. 14 of Act V of 1881.

192. Letters of administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate.

This is s. 15 of Act V of 1881.

193. When a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to accept or renounce his executorship; except that, when one or more of several executors have proved a will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved.

This is s. 16 of Act of V 1881. See pp. 326, 332.

194. The renunciation may be made orally in the presence of the Judge, or by a writing signed by the person renouncing, and when made shall preclude him from ever thereafter applying for probate of the will appointing him executor.

This is s. 17 of Act V of 1881. See p. 327.

195. If the executor renounce, or fail to accept the executorship within the time limited for the acceptance or refusal thereof, the will may be proved and letters of administration with a copy of the will annexed may be granted to the person who would be entitled to administration in case of intestacy.

This is s. 18 of Act V of 1888. See p. 327.

196. When the deceased has made a will, but has not appointed an executor, or

when he has appointed an executor who is legally incapable, or refuses to act, or has died before the testator, or before he has proved the will, or

when the executor dies after having proved the will but after before he has administered all the estate of the deceased;

an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.

This is s. 19 of Act V of 1881. See pp. 330, 344, 348.

197. When a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been fully administered, his representative has the same right to administration with the will annexed as such residuary legatee.

This is s. 20 of Act V of 1881. See p. 331.

198. When there is no executor and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.

This is s. 21 of Act V of 1881. See p. 331.

199. Letters of administration with the will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next-of-kin to accept or refuse letters of administration.

This is s. 22 of Act V of 1881. See pp. 332, 336.

200. When the deceased has died intestate, those who are connected with him either by marriage or by consanguinity, are entitled to obtain letters of administration of his estate and effects in the order and according to the rules hereinafter stated.*

201. If the deceased has left a widow, administration shall be granted to the widow unless the Court shall see cause to exclude her, either on the ground of some personal disqualification, or because she has no interest in the estate of the deceased.

Illustrations.

(*a.*) The widow is a lunatic, or has committed adultery, or has been barred by her marriage-settlement of all interest in her husband's estate; there is cause for excluding her from the administration.

(*b.*) The widow has married again since the decease of her husband; this is not good cause for her exclusion.

See p. 327.

202. If the Judge think proper, he may associate any person with the widow in the administration, who would be entitled solely to the administration if there were no widow.

See pp. 327, 328.

203. If there be no widow, or if the Court see cause to exclude the widow, it shall commit the administration to the persons who would be beneficially entitled to the rules for the distribution of an intestate's estate;

provided that, when the mother of the deceased shall be one of the class of persons so entitled, she shall be solely entitled to administration.

See p. 328.

204. Those who stand in equal degree of kindred to the deceased, are equally entitled to administration.

See p. 328.

205. The husband, surviving his wife, has the same right of administration of her estate as the widow has in respect of the estate of her husband.

See p. 328.

206. Where there is no person connected with the deceased by marriage or consanguinity

who is entitled to letters of administration, and willing to act, they may be granted to a creditor.

See p. 328.

207. Where the deceased has left property in British India, letters of administration must be granted according to the foregoing rules, although he may have been a domiciled inhabitant of a country in which the law relating to testate and intestate succession differs from the law of British India.

PART XXX.*

OF LIMITED GRANTS.

(a). *Grants limited in Duration.*

208. When the will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft limited until the original or a properly authenticated copy of it be produced.

This is s. 24 of Act V of 1881. See p. 333.

209. When the will has been lost or destroyed and no copy has been made nor the draft preserved, probate may be granted of its contents, if they can be established by evidence.

This is s. 25 of Act V of 1881. See pp. 333-4.

210. When the will is in the possession of a person residing out of the Province in which application for probate is made, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary for the interest of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it be produced.

This is s. 26 of Act V of 1881. See p. 334.

211. Where no will of the deceased is forthcoming, but there is reason to believe that there is a will in existence, letters of administration may be granted, limited until the will, or an authenticated copy of it be produced.

This is s. 27 of Act V of 1881. See p. 334.

(b.) *Grants for the Use and Benefit of others having Right.*

212. When any executor is absent from the Province in which application is made, and there is no executor within the Province willing to act, letters of administration, with the will annexed, may be granted to the attorney of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

This is s. 28 of Act V of 1881 the word "agent being substituted for attorney." See pp. 335, 376.

213. When any person to whom, if present, letters of administration with the will annexed might be granted, is absent from the Province, letters of administration with the will annexed may be granted to his attorney, limited as abovementioned.

This is s. 29 of Act V of 1881, the word "agent" being substituted for "attorney." See p. 335.

214. When a person entitled to administration in case of intestacy is absent from the Province, and no person equally entitled is willing to act, letters of administration may be granted to the attorney of the absent person, limited as before mentioned.

This is s. 30 of Act V of 1881 the word "agent" being substituted for "attorney." See p. 336.

215. When a minor is sole executor or sole residuary legatee, letters of administration, with the will annexed, may be granted to the legal guardian of such minor or to such other person as the Court shall think fit until the minor shall have completed the age of eighteen years, at which period and not before, probate of the will shall be granted to him.

This is s 31 of Act V of 1881. See pp. 315, 337.

216. When there are two or more minor executors and no executor who has attained majority, or two or more residuary legatees and no residuary legatee who has attained majority, the grant shall be limited until one of them shall have completed the age of eighteen years.

This is s. 32 of Act V of 1881. See pp. 316, 337.

217. If a sole executor or a sole universal or residuary legatee, or a person who would be solely entitled to the estate of the intestate according to the rule of the distribution of in-

* Sections 200—207 have not been incorporated in Act V of 1881. Instead of those sections that Act contains the provisions laid down in s. 23.

testates' estates, be a lunatic, letters of administration, with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority, or if there be no such person, to such other person as the Court may think fit to appoint, for the use and benefit of the lunatic until he shall become of sound mind.

This section is incorporated as s. 33 in Act V of 1881 with an alteration including minors as well as lunatics. See pp. 317, 337.

218. Pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court and shall act under its direction.

This is s. 34 of Act V of 1881. See p. 333.

(c.) *For Special Purposes.*

219. If an executor be appointed for any limited purpose specified in the will, the probate shall be limited to that purpose, and if he should appoint an attorney to take administration on his behalf, the letters of administration with the will annexed shall accordingly be limited.

This is s. 35 of Act V of 1881. See pp. 320, 321, 338.

220. If an executor appointed generally give an authority to an attorney to prove a will on his behalf, and the authority is limited to a particular purpose, the letters of administration with the will annexed shall be limited accordingly.

This is s. 36 of Act V of 1881. See p. 339.

221. Where a person dies, leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the person beneficially interested in the property, or to some other person on his behalf.

This is s. 37 of Act V of 1881.

222. When it is necessary that the representative of a person deceased be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same, or in any other Court between the parties, touching the matters at issue in the said cause or suit, and until a final decree shall be made therein and carried into complete execution.

This is s. 38 of Act V of 1881.

223. If at the expiration of twelve months from the date of any probate or letters of administration, the executor or administrator to whom the same has been granted is absent from the Province within which the Court that has granted the probate or letters of administration is situate, it shall be lawful for such Court to grant, to any person whom it may think fit, letters of administration limited to the purpose of becoming and being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect.

This is s. 39 of Act V of 1881. See p. 339.

224. In any case in which it may appear necessary for preserving the property of a deceased person, the Court within whose district any of the property is situate, may grant to any person whom such Court may think fit, letters of administration limited to the collection and preservation of the property of the deceased, and giving discharges for debts due to her estate, subject to the directions of the Court.

This is s. 40 of Act V of 1881. See p. 340.

225. When a person has died intestate, or leaving a will of which there is no executor willing and competent to act, or where the executor shall, at the time of the death of such person, be resident out of the Province, and it shall appear to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof, other than the person who under ordinary circumstances would be entitled to a grant of administration, it shall be lawful for the Judge, in his discretion, having regard to consanguinity, amount of interest, the safety of the estate, and probability that it will be properly administered, to appoint such person as he shall think fit to be administrator,

and in every such case letters of administration may be limited or not as the Judge shall think fit.

This is s. 41 of Act V of 1881. See p. 340.

(d.) Grants with Exception.

226. Whenever the nature of the case requires that an exception be made, probate of a will, or letters of administration with the will annexed, shall be granted subject to such exception.

This is s. 42 of Act V of 1881. See p. 342.

227. Whenever the nature of the case requires that an exception be made, letters of administration shall be granted subject to such exception.

This is s. 43 of Act V of 1881. See p. 343.

(e.) Grants of the Rest.

228. Whenever a grant, with exception, of probate or letters of administration, with or without the will annexed, has been made, the person entitled to probate or administration of the remainder of the deceased's estate may take a grant of probate of letters of administration, as the case may be, of the rest of the deceased's estate.

This is s. 44 of Act V of 1881. See p. 344.

(f.) Grants of Effects unadministered.

229. If the executor to whom probate has been granted have died leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate.

This is s. 45 of Act V of 1881. See pp. 330, 344.

230. In granting letters of administration of an estate not fully administered, the Court shall be guided by the same rules as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made.

This is s. 46 of Act V of 1881. See p. 344.

231. When a limited grant has expired by effluxion of time, or the happening of the event or contingency on which it was limited, and there is still some part of the deceased's estate unadministered, letters of administration shall be granted to those persons to whom original grants might have been made.

This is section 47 of Act V of 1881. See p. 344.

(g.) Alteration in Grants.

232. Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the Court, and the grant of probate or letters of administration may be altered and amended accordingly.

This is s. 40 of Act V of 1881. See p. 345.

233. If, after the grant of letters of administration with the will annexed, a codicil be discovered, it may be added to the grant on due proof and identification, and the grant altered accordingly.

This is s. 49 of Act V of 1881. See p. 346.

(h.) Revocation of Grants.

234. The grant of probate or letters of administration may be revoked or annulled for just cause.

Explanation.—Just cause is—

1*st*, that the proceedings to obtain the grant were defective in substance;

2*nd*, that the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case;

3*rd*, that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently;

4*th*, that the grant has become useless and inoperative through circumstances.

[5th, that the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Part XXXIV of this Act or has exhibited under that Part an inventory or account which is untrue in a material respect."—*Added by s. 2 of Act VI of* 1889.]

Illustrations.

(*a.*) The Court by which the grant was made had no jurisdiction.

(*b.*) The grant was made without citing parties who ought to have been cited.

(*c.*) The will of which probate was obtained was forged or revoked.

(*d.*) A obtained letters of administration to the estate of B, as his widow, but it has since transpired that she was never married to him.

(*e.*) A has taken administration to the estate of B as if he had died intestate, but a will has since been discovered.

(*f.*) Since probate was granted, a later will has been discovered.

(*g.*) Since probate was granted, a codicil has been discovered, which revokes or adds to the appointment of executors under the will.

(*h.*) The person to whom probate was, or letters of administration were, granted has subsequently become of unsound mind.

This section, which has been amended by s. 2 of Act VI of 1889, is s. 50 of Act V of 1881, as amended by the same Act. See pp. 346, 347, 348, 358.

PART XXXI.

OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION.

235. The District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all case, within his district.

This is s. 51 of Act V of 1881. See p. 351.

235A. The High Court may, from time to time, appoint such judicial officers within any District as it thinks fit, to act for the District Judge as Delegates to grant probate and letters of administration in non-contentious cases within such local limits as it may from time to time prescribe: Provided that, in the case of High Courts not established by Royal Charter, such appointment be made with the previous sanction of the Local Government.

Persons so appointed shall be called 'District Delegates.'

This section which is 52 of Act V. of 1881, was added by s. 2 of Act VI of 1881. See p. 352.

236. The District Judge shall have the like powers and authority in relation to the granting of probate and letters of administration, and all matters connected therewith, as are by law vested in him in relation to any civil suit or proceeding depending in his Court.

This is s. 53 of Act V of 1881. See p. 352.

237. The District Judge may order any person to produce and bring into Court any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person;

and if it be not shown that any such paper or writing is in the possession or under the control of such person, but there is reason to believe that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined respecting the same.

and such person shall be bound to answer such questions as may be put to him by the Court and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like punishment under the Indian Penal Code, in case of default in not attending or in not answering such questions or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit, and had made such default,

and the costs of the proceeding shall be in the discretion of the Judge.

This is s. 5 of Act V of 1881. See p. 353.

238. The proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, except as hereinafter otherwise provided, be regulated so far far as the circumstances of the case will admit by the Code of Civil Procedure.

This is s. 55 of Act V of 1881. See p. 352.

239. Until probate be granted of the will of a deceased person, or an administrator of his estate be constituted, the District Judge within whose jurisdiction any part of the property of the deceased person is situate, is authorized and required to interfere for the protection of such property, at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he shall see fit, to appoint an officer to take and keep possession of the property.

This section has not been incorporated in Act V of 1881. See p. 354.

240. Probate of the will or letters of administration to the estate of a deceased person may be granted by the District Judge under the seal of his Court, if it shall appear by a petition verified as hereinafter mentioned, of the person applying for the same, that the testator or intestate, as the case may be, at the time of his decease, had a fixed place of abode, or any property, moveable or immoveable, within the jurisdiction of the Judge.

This is s. 56 of Act V of 1881. See p. 353.

241. When the application is made to the Judge of a District in which the deceased had no fixed abode at the time of his death, it shall be in the discretion of the Judge to refuse the application, if in his judgment it could be disposed of more justly or conveniently in

another district, or where the application is for letters of administration, to grant them absolutely, or limited to the property within his own jurisdiction.

This is s. 57 of Act V of 1881. See p. 353.

241A. Probates and letters of administration may upon application for that purpose to any District Delegate, be granted by him in any case in which there is no contention, if it appears by petition (verified as hereinafter mentioned) that the testator or intestate, as the case may be, at the time of his death resided within the jurisdiction of such Delegate.

This section was added by s. 3 of Act VI of 1881. It is s. 58 of Act V of 1881. See p. 353.

242. Probate or letters of administration shall have effect over all the property and estate, moveable or immoveable, of the deceased, throughout the Province in which the same is granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted:

[Provided that probates and letters of administration granted by a High Court* after the first day of April, 1875, shall, unless otherwise directed by the grant, have like effect throughout the whole of British India.—*Added by Act XIII of* 1875, *s.* 2.]

This section, as amended by Act XIII of 1875 and read with Act II of 1877, s. 1, is s. 59 of Act V of 1881. See pp. 323, 325, 354, 356.

242A. Whenever a grant of probate or letters of administration is made by a High Court with such effect as last aforesaid, the Registrar or such other officer as the High Court making the grant appoints in this behalf shall send to each of the other High Courts a certificate to the following effect:—

I, *A. B.*, Registrar [*or as the case may be*] of the High Court of Judicature [*or as the case may be*], hereby certify that on the day of 188 the High Court of Judicature at [*or as the case may be*] granted probate of the will [*or* letters of administration of the estate] of *C. D.*, late of deceased, to *E. F.* and *G. H.* of , and that such probate [*or* letters] has [*or* have] effect over all the property of the deceased throughout the whole of British India;

and such certificate shall be filed by the High Court receiving the same.

This section was added by s. 2 of Act XIII of 1875. It corresponds with s. 66 of Act V of 1881. See pp. 353, 355, 356.

243. The application for probate or letters of administration, if made and verified in the manner hereinafter mentioned, shall be conclusive for the purpose of authorizing the grant of probate of administration, and no such grant shall be impeached by reason that the testator or intestate had no fixed place of abode, or no property at the time of his death, unless by a proceeding to revoke the grant if obtained by a fraud upon the Court.

This is s. 61 of Act V of 1881. See p. 353.

244. Application for probate shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the will annexed, and stating

the time of the testator's death,

that the writing annexed is his last will and testament, that it was duly executed,

[the amount of assets which are likely to come to the petitioner's hands,] and

that the petitioner is the executor named in the will;

and in addition to these particulars, when the application is to the District Judge, the petition shall further state that the deceased at the time of his death had his fixed place of abode, or had some property, moveable or immoveable, situate within the jurisdiction of the Judge, and when the application is to a District Delegate, the petition shall further state that the deceased at the time of his death resided within the jurisdiction of such Delegate.

This section corresponds with s. 62 of Act V of 1881. The last clause was added by s. 4 of Act VI of 1881. The amendment in brackets was made by s. 3 of Act VI of 1889. See pp. 353, 373.

245. In cases wherein the will is written in any language other than English or than that in ordinary use in proceedings before the Court, there shall be a translation thereof annexed to the petition by a translator of the Court, if the language be one for which a translator is appointed; or if the will be in any other language, then by any person competent to translate the same, in which case such translation shall be verified by that person in the following manner:—

"I (A. B) do declare that I read and perfectly understand the language and character of the original, and that the above is a true and accurate translation thereof."

This is s. 63 of Act V of 1881. See p. 353.

* See Act II of 1877, s. 1.

246. Applications for letters of administration shall be made by petition distinctly written as aforesaid, and stating

the time and place of the deceased's death,

the family or other relatives of the deceased, and their respective residences,

the right in which the pititioner claims,

that the deceased left some property within the jurisdiction of the District Judge [or District Delegate] to wham the application is made, and

the amount of assets which are likely to come to the petitioner's hands, [and when the application is to a District Delegate, the petition shall further state that the deceased at the time of his death resided within the jurisdiction of such Delegate.]

This is s. 64 of Act V of 1881. The word in brackets were added by ss. 4 and 9 respectively of Act VI of 1881.

246A. Every person applying to a High Court for probate of a will or letters of administration of an estate, intended to have effect throughout British India, shall state in his petition, in addition to the matters respectively required by section 246 of this Act, that to the best of his belief no application has been made to any other High Court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid,

or, where any such application has been made, the High Court to which it was made, the person or persons by whom it was made, and the proceedings (if any) had thereon.

And the High Court to which any application is made under the proviso to section 242 of this Act may, if it think fit reject the same.

This section has been added by s. 3 of Act XIII of 1875. It is s. 65 of Act V of 1881.

247. The petition for probate or letters of administration shall in all cases be subscribed by the petitioner and his pleader, if any, and shall be verified by the petitioner in the following manner or to the like effect :—

"I (A. B.), the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief.

This is s. 66 of Act V of 1881. See p. 356.

248. Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the will (when procurable), in the manner or to the effect following :—

"I (C. D.), one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (*or* mark) thereto (*as the case may be*) (*or* that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence)."

This is s. 67 of Act V of 1881. See p. 356.

249. If any petition or declaration which is hereby required to be verified shall contain any averment which the person making the verification knows or believes to be false, such person shall be subject to punishment according to the provisions of the law for the time being in force for the punishment of giving or fabricating false evidence.

This is s. 68 of Act V of 1881. See p. 356.

250. In all cases it shall be lawful for the District Judge [or District Delegate,] if he shall think proper, to examine the petitioner in person, upon oath or solemn affirmation, and also to require further evidence of the due execution of the will, or the right of the petitioner to the letters of administration, as the case may be, and to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.

The citation shall be fixed up in some conspicuous part of the Court-house, and also in the office of the Collector of the District, and otherwise published or made known in such manner as the Judge [or District Delegate] issuing the same may direct.

This is s. 69 of Act V of 1881. The words in brackets were added by s. 9 of Act VI of 1881. See pp. 332, 333, 357.

[251. Caveats against the grant of probate or administration may be lodged with the District Judge or a District Delegate ; and immediately on any caveat being lodged with any District Delegate, he shall send a copy thereof to the District Judge ; and immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased resided at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same.]

This section is s. 70 of Act V of 1881. It was substituted for the original section by s. 5 of Act VI of 1881. See p. 358.

252. The caveat shall be to the following effect :—

" Let nothing be done in the matter of the estate of *A. B.*, late of , deceased, who died on the day of at without notice to *C. D.* of. "

This is s. 70 of Act V of 1881. See p. 358.

253. No proceeding shall be taken on a petition for probate or letters of administration after a caveat against the grant thereof has been entered with the Judge [or officer] to whom the application has been made [or notice has been given of its entry with some other Delegate] until after such notice to the person by whom the same has been entered as the Court shall think reasonable.

This is s. 72 of Act V of 1881. The words in brackets were inserted by s. 6 of Act VI of 1881. See pp. 358, 359.

253A. A District Delegate shall not grant probate or letters of administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that probate or letters of administration ought not to be granted in his Court.

Explanation.—By 'contention' is understood the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding.

This section was added by s. 7 of Act VI of 1881. It is s. 73 of Act V of 1881. See p. 359.

253B. In every case in which there is no contention, but it appears to the District Delegate doubtful whether the probate or letters of administration should or should not be granted, or when any question arises in relation to the grant, or application for the grant, of any probate or letters of administration, the District Delegate may, if he think proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter of the application, according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge.

This section was added by s. 7 of Act VI of 1881. It is s. 74 of Act V of 1881. See p. 359.

253C. In every case in which there is contention, or the District Delegate is of opinion that the probate or letters of administration should be refused in his Court, the petition, with any documents that may have been filed therewith, shall be returned to the person by whom the application was made, in order that the same may be presented to the District Judge; unless the District Delegate thinks it necessary, for tha purposes of justice, to impound the same, which he is hereby authorized to do; and in that case the same shall be sent by him to the District Judge.

This section was added by s. 7 of Act VI of 1881. It is s. 75 of Act V of 1881. See p. 359.

254. When it shall appear to the Judge [or District Delegate] that probate of a will should be granted, he will grant the same under the seal of his Court in manner following:—

"I, Judge of the District of [or Delegate appointed for granting probate or letters of administration in (here insert the limits of the Delegate's jurisdiction)] hereby make known that on the day of in the year the last will of late of , a copy where of is hereunto annexed, was proved and registered before me, and that administration of the property and credits of the said deceased, and in any way concering his will, was granted to the executor in the said will named, ["he having undertaken to administer the same, and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may from time to time appoint, and also to render to this Court a true account of the said property and credits within one year from the same date or within such further time as the Court may from time to time appoint."—*Substituted for words struck out by Act VI of* 1889, *s.* 4.]

This section is s. 76 of Act V of 1881. It has been amended by ss. 8 and 9 of Act VI of 1881 and s. 4 of Act VI of 1889. See p. 359.

255. And wherever it shall appear to the District Judge or District Delegate that letters of administration to the estate of a person deceased, with or without a copy of the will annexed, should be granted, he will grant the same under the seal of his Court in manner following:—

"I, , Judge of the District of [or Delegate appointed for granting probate or letters of administration in (here insert the limits of the Delegate's jurisdiction)] hereby make known that on the day of letters of administration (with *or* without the will annexed, *as the case may be*) of the property and credits of , late of , deceased, were granted to , the father (*or as the case may be*) of the deceased, ["he having undertaken to administer the same, and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may from time to time appoint, and also to render to this Court a true account of the said property and credits within one year from the same date or within such further time as the Court may from time to time appoint"—*Substituted for words struck out by Act VI of* 1889, *s.* 4.]

This section is s. 77 of Act V of 1881. It has been amended by ss. 8 and 9 of Act VI of 1881 and s. 4 of Act VI of 1889. See p. 359.

256. Every person to whom any grant [*of letters*] of administration is [see Act VI of 1889, s. 6] committed shall give a bond to the Judge of the District Court to enure for the benefit of the Judge for the time being, with one or more surety or sureties, engaging for the due collection, getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge shall from time to time by any general or special order direct.

This section corresponds with s. 78 of Act V of 1881 which, however empowers the Judge to take a bond from an executor. The words in brackets were added by s. 6 of Act VI of 1889. See pp. 359, 374.

257. The Court may, on application made by petition and on being satisfied that the engagement of any such bond has not been kept, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise as the Court may think fit, assign the same to some person, his executors or administrators, who shall thereupon be entitled to sue on the said bond in his own name as if the same had been originally given to him instead of to the Court, and shall be entitled to recover thereon as trustee for all persons interested, the full amount recoverable in respect of any breach thereof.

This is s. 79 of Act V of 1881.

258. No probate of a will shall be granted until after the expiration of seven clear days, and no letters of administration shall be granted until after the expiration of fourteen clear days, from the days of the testator or intestate's death.

This is s. 80 of Act V of 1881. See p. 354.

259. Every District Judge [or District Delegate] shall file and preserve all original wills of which probate or letters of administration with the will annexed may be granted by him among the records of his Court, until some public registry for wills is established; and the Local Government shall make regulations for the preservation and inspection of the wills so field as aforesaid.

The words in brackets were added by section 9 of Act VI of 1881. The corresponding section of Act V of 1881 is s. 81. See p. 361.

260. After any grant of probate or letters of administration, no other than the person to whom the same shall have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, throughout the Province in which the same may have been granted, until such probate or letters of administration shall have been recalled or revoked.

This is s. 82 of Act V of 1881. See p. 360.

261. In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, in which the petitioner for probate or letters of administration, as the case may be shall be the plaintiff, and the person who may have appeared as aforesaid to oppose the grant shall be the defendant.

This is s. 83 of Act V of 1881. See pp. 347, 360.

262. Where any probate is or letters of administration are revoked, all payments *bonâ fide* made to any executor or administrator under such probate or administration before the revocation thereof shall, notwithstanding such revocation, be a legal discharge to the person making the same;

and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him, which the person to whom probate or letters of administration shall be afterwards granted might have lawfully made.

This is s. 84 of Act V of 1881. See p. 361.

263. Every order made by a District Judge by virtue of the powers hereby conferred upon him, shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals.

This is s. 86 of Act V of 1881. See p. 352.

264. The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

This is s. 87 of Act V of 1881. See p. 351.

PART XXXII.*

OF EXECUTORS OF THEIR OWN WRONG.

265. A person who intermeddles with the estate of the deceased, or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself an executor of his own wrong.

* This part has not been incorporated in Act V of 1881.

Exceptions. First.—Intermeddling with the goods of the deceased for the purpose of preserving them, or providing for his funeral or for the immediate necessities of his family or property, does not make an executor of his own wrong.

Second.—Dealing in the ordinary course of business with goods of the deceased received from another, does not make an executor of his own wrong.

Illustrations.

(*a.*) A uses or gives away or sells some of the goods of the deceased, or takes them to satisfy his own debt or legacy, or receives payment of the debts of the deceased. He is an executor of his own wrong.

(*b.*) A having been appointed agent by the deceased in his lifetime to collect his debts and sell his goods, continues to do so after he has become aware of his death. He is an executor of his own wrong in respect of acts done after he has become aware of the death of the deceased.

(*c.*) A sues as executor of the deceased, not being such. He is an executor of his own wrong.

See pp. 326, 364.

266. When a person has so acted as to become an executor of his own wrong, he is answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his hands, after deducting payments made to the rightful executor or administrator, and payments made in a due course of administration.

See p. 366.

PART XXXIII.

OF THE POWERS OF AN EXECUTOR OR ADMINISTRATOR.

266. An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and to distrain for all rents due to him at the time of his death, as the deceased had when living.

This is s. 88 of Act V of 1881. See p. 367.

268. All demands whatsoever and all rights to prosecute or defend any action or special proceeding, existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory.

Illustrations.

(*a.*) A collision takes place on a railway in consequence of some neglect or default of the officials, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive.

(*b.*) A sues for divorce. A dies. The cause of action does not survive to his representative.

This is s. 89 of Act V of 1881. See p. 367.

269. An executor or administrator has power to dispose of the property of the deceased, either wholly or in part, in such manner as he may think fit.

Illustrations.

(*a.*) The deceased has made a specific bequest of part of his property. The executor, not having assented to the bequest, sells the subject of it. The sale is valid.

(*b.*) The executor, in the exercise of his discretion, mortgages a part of the immoveable estate of the deceased. The mortgage is valid.

The corresponding s. of Act V 1881, is s. 90, but this section differs very materially from that section. See pp. 367, 369.

270. If an executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other peason interested in the property sold.

This is s. 91 of Act V of 1881. See p. 371.

271. When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration.

Illustrations.

(*a.*) One of several executors has power to release a debt due to the deceased.
(*b.*) One has power to surrender a lease.
(*c.*) One has power to sell the property of the deceased, moveable or immoveable.
(*d.*) One has power to assent to a legacy.
(*e.*) One has power to endorse a promissory note payable to the deceased.
(*f.*) The will appoints A, B, C and D to be executors, and directs that two of them shall be a quorum. No act can be done by a single executor.

This is s. 92 of Act V of 1881. See pp. 320, 371, 372.

272. Upon the death of one or more of several executors or administrators, all the powers of the office become vested in the survivors or survivor.

This is s. 93 of Act V of 1881. See pp. 322, 371.

273. The administrator of effects unadministered has with respect to such effects, the same powers as the original executor or administrator.

This is s. 94 of Act V of 1881. See p. 372.

274. An administrator during minority has all the powers of an ordinary administrator.

This is s. 95 of Act V of 1881. See p. 337.

275. When probate or letters of administration have been granted to a married woman she has all the powers of an ordinary executor or administrator.

This is s. 96 of Act V of 1881. See p. 372.

PART XXXIV.

OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR.

276. It is the duty of an executor to perform the funeral of the deceased in a manner suitable to his condition, if he has left property sufficient for the purpose.

This section with slight modifications is s. 97 of Act V of 1881. See p. 372.

[277. (1) An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the Court which granted the probate or letters may from time to time appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and and also all the debts owing by any person to which the executor or administrator is entitled in that character, and shall in like manner, within one year from the grant or within such further time as the said Court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of.

"(2) The High Court may from time to time prescribe the form in which an inventory or account under this section is to be exhibited.

"(3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under section 176 of the Indian Penal Code.

"(4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under section 193 of that Code.]

This section has been substituted for the original section 277.* It corresponds with the new s. 98 of Act XV of 1881. See pp. 373, 374.

277A. In all cases where [*it is sought to obtain a grant*—Struck out by s. 8 of Act VI of 1889,] *a grant has been made* of probate or letters of administration intended to have effect throughout the whole of British India, the executor, or [*the person applying for administration after the first day of April*, 1875—Struck out by s. 8 of Act VI of 1889] *administrator* to the effects, of any person dying in British India and leaving property in more than one Province shall include in the inventory of the effects of the deceased his moveable or immoveable property situate in such of the Provinces:

And the value of such property situate in the said Provinces. respectively, shall be separately stated in such inventory, and the probate or letters of administration shall be

* 277. An executor or administrator shall, within six months fromt he grant of probate or letters of administration, exhibit in the Court by which the same may have been granted an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person or persons to which the executor or administrator is entitled in that character, and shall in like manner, within one year from the date aforesaid, exhibit an account of the estate, showing the assets that may have come to his hands, and the manner in which they have been applied or disposed of.—Repealed by s. 7 of Act VI of 1889.

chargeable with a fee corresponding to the entire amount or value of the property affected thereby wheresoever situate within British India.

This section was inserted by s. 5 of Act XIII of 1875.

The words in italics and not in brackets have been substituted by Act VI of 1889, s. 8 for the words (struck) out. The corresponding section of Act V of 1881, is s. 99. See p. 374.

278. The executor or administrator shall collect, with reasonable diligence, the property of the deceased and the debts that were due to him at the time of his death.

This is s. 100 of Act V of 1881. See p. 374.

279. Funeral expenses to a reasonable amount, according to the degree and quality of the deceased, and deathbed charges, including fees for medical attendance, and board and lodging, for one month previous to his death, are to be paid before all debts.

This is s. 101 of Act V of 1881. See pp. 375, 380.

280. The expenses of obtaining probate or letters of administration, including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate, are to be paid next after the funeral expenses and deathbed charges.

This is s. 102 of Act V of 1881. See pp. 376, 380.

281. Wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan or domestic servant are next to be paid, and then the other debts of the deceased.

This is embodied with a slight alteration as s. 103 in Act V of 1881. See p. 376.

282. Save as aforesaid, no creditor is to have a right of priority over another, by reason that his debt is secured by an instrument under seal, or on any other account.

But the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably, as far as the assets of the deceased will extend.

This is s. 104 of Act V of 1881. See pp. 366, 376.

283. If the domicile of the deceased was not in British India, the application of his moveable property to the payment of his debts is to be regulated by the law of [*the country in which he was domiciled*] British India.

Illustration.

[*A dies, having his domicile in a country where instruments under seal have priority over instruments not under seal, leaving moveable property to the value of* 10,000 *rupees, immoveable property to the value of* 5,000 *rupees, debts on instruments under seal to the amount of* 10,000 *rupees, and debts on instruments not under seal to the same amount. The debts on the instruments under seal are to be paid in full out of the moveable estate, and the proceeds of the immoveable estate are to be applied as far as they will extend towards the discharge of the debts not under seal. Accordingly, one half of the amount of the debts not under seal is to be paid out of the proceeds of the immoveable estate.*—Repealed by s. 9 of Act VI of 1889.]

This section has not been incorporated in Act V of 1881. The words "British India" in the section have been substituted for the words in brackets by s. 9 of Act V of 1881. The illustration has been repealed by the same section. See pp. 16, 379.

284. No creditor who has received payment of a part of his debt by virtue of the last preceding section shall be entitled to share in the proceeds of the immoveable estate of the deceased unless he brings such payment into account for the benefit of the other creditors.

Illusiration.

A dies, having his domicile in a country where instruments under seal have priority over instruments not under seal, leaving moveable property to the value of 5,000 rupees, and immoveable property to the value of 10,000 rupees, debts on instruments under seal to the amount of 10,000 rupees, and debts on instruments not under seal to the same amount. The creditors holding instruments under seal receive half of their debts out of the proceeds of the moveable estate. The proceeds of the immoveable estate are to be applied in payment of the debts on instruments not under seal until one-half of such debts has been discharged. This will leave 5,000 rupees, which are to be distributed rateably amongst all the creditors without distinction in proportion to the amount which may remain due to them.

This section has not been incorporated in Act V of 1881. See p. 379.

285. Debts of every description must be paid before any legacy.

This is s. 105 of Act V of 1881. See p. 379.

286. If the estate of the deceased is subject to any contingent liabilities, an executor or administrator is not bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.

This is s. 106 of Act V of 1881. See p. 379.

287. If the assets, after payment of debts, necessary expenses and specific legacies, are not sufficient to pay all the general legacies in full, the letter shall abate or be diminished in equal proportions,

and the executor has no right to pay one legatee in preference to another, nor to retain any money on account of a legacy to himself or to any person for whom he is a trustee.

This is s. 107 of Act V of 1881. See p. 380.

288. Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement.

This is s. 108 of Act V of 1881. See p. 276.

289. Where there is a demonstrative legacy, and the assets are sufficient for the payment of debts and necessary expenses, the legatee has a preferential claim for payment of his legacy out of the fund from which the legacy is directed to be paid until such fund is exhausted, and if after the fund is exhausted, part of the legacy still remains unpaid, he is entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder.

This is 109 of Act V of 1881. See p. 382.

290. If the assets are not sufficient to answer the debts and the specific legacies, an abatement shall be made from the latter rateably in proportion to their respective amounts.

Illustration.

A has bequeathed to B a diamond-ring valued at 500 rupees, and to C a horse, valued at 1,000 rupees. It is found necessary to sell all the effects of the testator, and his assets, after payment of debts, are only 1,000 rupees. Of this sum rupees 333-5-4 are to be paid to B, and rupees 666-10-8 to C.

This is s. 110 of Act V of 1881. See p. 382.

291. For the purpose of abatement, a legacy for life, a sum appropriated by the will to produce an annuity, and the value of annuity, when no sum has been appropriated to produce it, shall be treated as general legacies.

This is s. 111 of Act V of 1881. See p. 300.

PART XXXV.

OF THE EXECUTOR'S ASSENT TO A LEGACY.

292. The assent of the executor is necessary to complete a legatee's title to his legacy.

Illustrations.

(*a.*) A by his will bequeaths to B his Government paper which is in deposit with the Bank of Bengal. The Bank has no authority to deliver securities, nor B a right to take possession of them, without the assent of the executor.

(*b.*) A by his will has bequeathed to C his house in Calcutta in the tenancy of B. C is not entitled to receive the rents without the assent of the executor.

This is s. 112 of Act V of 1881. See p. 382.

293. The assent of the executor to a specific bequest shall be sufficient to divest his interest as executor therein, and to transfer the subject of the bequest to the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way.

This assent may be verbal, and it may be either express or implied from the conduct of the executor.

Illustrations.

(*a.*) A horse is bequeathed. The executor requests the legatee to dispose of it, or a third party proposes to purchase the horse from the executor, and he directs him to apply to the legatee. Assent to the legacy is implied.

(*b.*) The interest of a fund is directed by the will to be applied for the maintenance of the legatee during his minority. The executor commences so to apply it. This is an assent to the whole of the bequest.

(*c.*) A bequest is made of a fund to A, and after him to B. The executor pays the interest of the fund to A. This is an implied assent to the bequest to B.

(*d.*) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed.

(*e.*) A person to whom a specific article has been bequeathed takes possession of it and retains it without any objection on the part of the executor. His assent may be presumed.

This is s. 113 of Act V of 1881.

See pp. 369, 382, 383.

294. The assent of an executor to a legacy may be conditional, and if the condition be one which he has a right to enforce, and it is not performed, there is no assent.

Illustrations.

(*a.*) A bequeaths to B his lands of Sultanpur, which at the date of the will, and at the death of A, were subject to a mortgage for 10,000 rupees. The executor assents to the bequest, on condition that B shall within a limited time pay the amount due on the mortgage at the testator's death. The amount is not paid. There is no assent.

(*b.*) The executor assents to a bequest on condition that the legatee shall pay him a sum of money. The payment is not made. The assent is nevertheless valid.

This is s. 114 of Act V of 1881. See p. 382.

295. When the executer is a legatee, his assent to his own legacy is necessary to complete his title to it, in the same way as it is required when the bequest is to another person, and his assent may in like manner be express or implied.

Assent shall be implied if in his manner of administering the property he does any act which is referable to his character of legatee and is not referable to his character of executor.

Illustration.

An executor takes the rent of a house or the interest of Government-securities bequeathed to him, and applies it to his own use. This is assent.

This is s. 115 of Act V of 1881. See p. 382.

296. The assent of the executor to a legacy gives effect to it from the death of the testator.

Illustrations.

(*a.*) A legatee sells his legacy before it is assented to by the executor. The executor's subsequent assent operates for the benefit of the purchaser, and completes his title to the legacy.

(*b.*) A bequeaths 1,000 rupees to B with interest from his death. The executor does not assent to this legacy until the expiration of a year from A's death. B is entitled to interest from the death of A.

This is s. 116 of Act V of 1881. See p. 383.

297. An executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death.

Illustration.

A by his will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year.

This is s. 117 of Act V of 1881. See p. 383.

PART XXXVI.

OF THE PAYMENT AND APPORTIONMENT OF ANNUITIES.

298. When an annuity is given by the will, and no time is fixed for its commencement, it shall commence from the testator's death, and the first payment shall be made at the expiration of a year next after that event.

This is s. 118 of Act V of 1881. See pp. 300, 388.

299. Where there is a direction that the annuity shall be paid quarterly or monthly, the first payment shall be due at the end of the first quarter or first month, as the case may be, after the testator's death; and shall, if the executor think fit, be paid when due, but the executor shall not be bound to pay it till the end of the year.

This is s. 119 of Act V of 1881. See p. 301.

300. Where there is a direction that the first payment of an annuity shall be made within one month or any other division of time from the death of the testator, or on a day certain, the successive payments are to be made on the anniversary of the earliest day on which the will authorizes the first payment to be made;

and if the annuitant should die in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative.

This is s. 120 of Act V of 1881. See p 301.

PART XXXVII.

OF THE INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES.

301. Where a legacy, not being a specific legacy, is given for life, the sum bequeathed shall at the end of the year be invested in such securities as the High Court may, by any

general rule to be made from time to time, authorize or direct, and the proceeds thereof shall be paid to the legatee as the same shall accrue due.

This is s. 121 of Act V of 1881. See p. 386.

302. Where a general legacy is given to be paid at a future time, the executor shall invest a sum sufficient to meet it in securities of the kind mentioned in the last preceding section.

The intermediate interest shall form part of the residue of the testator's estate.

This is s. 122 of Act V of 1881. See p. 386.

303. Where an annuity is given and no fund is charged with its payment or appropriated by the will to answer it, a Government annuity of the specified amount shall be purchased, or,

if no such annuity can be obtained, then a sum sufficient to produce the annuity shall be invested for that purpose in such securities as the High Court may, by any general rule to be made from time to time, authorize or direct.

This is s. 123 of Act V of 1881. See p. 301.

304. Where a bequest is contingent, the executor is not bound to invest the amount of the legacy, but may transfer the whole residue of the estate to the residuary legatee on his giving sufficient security for the payment of the legacy if it shall become due.

This is s. 124 of Act V of 1881. See p. 386.

305. Where the testator has bequeathed the residue of his estate to a person for life without any direction to invest it in any particular securities, so much thereof as is not at the time of the testator's decease invested in such securities as the High Court may for the time being regard as good securities, shall be converted into money and invested in such securities.

This section has not been incorporated in Act V of 1881. See pp. 385, 386.

306. Where the testator has bequeathed the residue of his estate to a person for life with a direction that it shall be invested in certain specified securities, so much of the estate as is not at the time of his death invested in securities of the specified kind shall be converted into money and invested in such securities.

This is s. 125 of Act V of 1881. See p. 386.

307. Such conversion and investment as are contemplated by the two last preceding sections shall be made at such times and in such manner as the executor shall in his discretion think fit;

and until such conversion and investment shall be completed, the person who would be for the time being entitled to the income of the fund when so invested shall receive interest at the rate of four per cent. per annum upon the market-value (to be computed as of the date of the testator's death) of such part of the fund as shall not yet have been so invested.

This is s. 126 of Act V of 1881. See p. 386.

308. Where, by the terms of a bequest, the legatee is entitled to the immediate payment or possession of the money or thing bequeathed, but is a minor, and there is no discretion in the will to pay it to any person on his behalf, the executor or administrator shall pay or deliver the same into the Court of the District Judge, by whom [or by whose District Delegate] the probate was, or letters of administration with the will annexed were, granted, to the account of the legatee, unless the legatee be a ward of the Court of Wards;

and if the legatee be a ward of the Court of Wards the legacy shall be paid into that Court to his account, and such payment into the Court of the District Judge, or into the Court of Wards, as the case may be, shall be a sufficient discharge for the money so paid;

and such money when paid in shall be invested in the purchase of Government-securities which with the interest thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, as the Judge or the Court of Wards, as the case may be, may direct.

This is section 127 of Act V of 1881. The words in brackets being inserted by s 8 of Act VI of 1881. See p. 386.

PART XXXVIII.

OF THE PRODUCE AND INTEREST OF LEGACIES.

309. The legatee of a specific legacy is entitled to the clear produce thereof, if any, from the testator's death.

Exception—A specific bequest, contingent in its terms, does not comprise the produce of the legacy between the death of the testator and the vesting of the legacy.

The clear produce of it forms part of the residue of the testator's estate.

Illustrations.

(*a.*) A bequeaths his flock of sheep to B. Between the death of A and delivery by his executor the sheep are shorn, or some of the ewes produce lambs. The wool and lambs are the property of B.

(*b.*) A bequeaths his Government-securities to B, but postpones the delivery of them till the death of C. The interest which falls due between the death of A and the death of C belongs to B, and must unless he is a minor, be paid to him as it is received.

(*c.*) The testator bequeaths all his four per cent. Government promissory notes to A when he shall complete the age of 18. A, if he complete the age, is entitled to receive the notes, but the interest which accrues in respect of them, between the testator's death and A's completing 18, forms part of the residue.

This is s. 128 of Act V of 1881. See pp. 277, 283, 387.

310. The legatee under a general residuary bequest is entitled to the produce of the residuary fund from the testator's death.

Exception—A general residuary bequest contingent in its terms does not comprise the income which may accrue upon the fund bequeathed between the death of the testator and the vesting of the legacy.

Such income goes as undisposed of.

Illustrations.

(*a.*) The testator bequeaths the residue of his property to A, a minor, to be paid to him when he shall complete the age of 18. The income from the testator's death belongs to A.

(*b.*) The testator bequeaths the residue of his property to A when he shall complete the age of 18. A, if he complete that age, is entitled to receive the residue. The income which has accrued in respect of it since the testator's death goes as undisposed of.

This is s. 129 of Act V of 1881. See p. 387.

311. Where no time has been fixed for the payment of a general legacy, interest begins to run from the expiration of one year from the testator's death.

Exceptions.—(1.) Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator.

(2.) Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, the legacy shall bear interest from the death of the testator.

(3.) Where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it, interest is payable from the death of the testator.

This is s. 130 of Act V of 1881. See p. 387.

312. Where a time has been fixed for the payment of a general legacy, interest begins to run from the time so fixed.

The interest up to such time forms part of the residue of the testator's estate.

Exception.—Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, and the legatee is a minor, the legacy shall bear interest from the death of the testator, unless a specific sum is given by the will for maintenance.

This is s. 131 of Act V of 1881. See p. 388.

313. The rate of interest shall be four per cent. per annum.

The rate under s. 132 of Act V of 1881 is 6 per cent. See p. 388.

314. No interest is payable on the arrears of an annuity within the first year from the death of the testator, although a period earlier than the expiration of that year may have been fixed by the will for making the first payment of the annuity.

This is s. 133 of Act V of 1881. See p. 388.

315. Where a sum of money is directed to be invested to produce an annuity, interest is payable on it from the death of the testator.

This is s. 134 of Act V of 1881. See p. 388.

PART XXXIX.

OF THE REFUNDING OF LEGACIES.

316. When an executor has paid a legacy under the order of a Judge, he is entitled to call upon the legatee to refund, in the event of the assets proving insufficient to pay all the legacies.

This is s. 135 of Act V of 1881. See p. 383.

317. When an executor has voluntarily paid a legacy, he cannot call upon a legatee to refund, in the event of the assets proving insufficient to pay all the legacies.

This is s. 136 of Act V of 1881. See p. 383.

318. When the time prescribed by the will for the performance of a condition has elapsed, without the condition having been performed, and the executor has thereupon, without fraud distributed the assets; in such case, if further time has been allowed under the one hundred and twenty-fourth section, for the performance of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the executor, but those to whom he has paid it are liable to refund the amount.

This is s. 137 of Act V of 1881.

319. When the executor has paid away the assets in legacies, and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion.

This is s. 138 of Act V of 1881. See p. 383.

320. Where an executor or administrator has given such notices as would have been given by the High Court in an administration-suit, for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets, or any part thereof, in discharge of such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he shall not have had notice at the time of such distribution;

but nothing herein contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of the persons who may have received the same respectively.

This with slight alterations is s. 139 of Act V of 1881. See p. 384.

321. A creditor who has not received payment of his debt may call upon a legatee who has received payment of his legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies; and whether the payment of the legacy by the executor was voluntary or not.

This section has been incorporated as s. 140 in Act V of 1881, as amended by Act XV of 1887, schedule I, Art. 43. See p. 384.

322. If the assets were sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy, or who has been compelled to refund under the last preceding section, cannot oblige one who has received payment in full to refund, whether the legacy were paid to him with or without suit, although the assets have subsequently become deficient by the wasting of the executor.

This is s. 141 of Act V of 1881. See p. 384.

323. If the assets were not sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy, must, before he can call on a satisfied legatee to refund, first proceed against the executor if he is solvent; but if the executor is insolvent or not liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion.

This is s. 142 of Act V of 1881. See p. 384.

324. The refunding of one legatee to another shall not exceed the sum by which the satisfied legacy ought to have been reduced if the estate had been properly administered.

Illustration.

A has bequeathed 240 rupees to B, 480 rupees to C, and 720 rupees to D. The assets are only 1,200 rupees and if properly administered would give 200 rupees to B, 400 rupees to C, and 600 rupees to D. C and D have been paid their legacies in full, leaving nothing to B. B can oblige C to refund 80 rupees, and D to refund 120 rupees.

This is s. 143 of Act V of 1881. See p. 384.

325. The refunding shall in all cases be without interest.

This is s. 144 of Act V of 1881. See p. 384.

326. The surplus or residue of the deceased's property after payment of debts and legacies, shall be paid to the residuary legatee when any has been appointed by the will.

This is s. 145 of Act V of 1881. See p. 386.

PART XL.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR FOR DEVASTATION.

327. When an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned.

Illustrations.

(*a*.) The executor pays out of the estate an unfounded claim. He is liable to make good the loss.

(*b.*) The deceased had a valuable lease renewable by notice, which the executor neglects to give at the proper time. The executor is liable to make good the loss.

(*c.*) The deceased had a lease of less value than the rent payable for it, but terminable on notice at a particular time. The executor neglects to give the notice. He is liable to make good the loss.

This is s. 146 of Act V of 1881. See p. 388.

328. When an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount.

Illustrations.

(*a.*) The executor absolutely releases a debt due to the deceased from a solvent person, or compounds with a debtor who is able to pay in full. The executor is liable to make good the amount.

(*b.*) The executor neglects to sue for a debt till the debtor is liable to plead the Act for the limitation of suits, and the debt is thereby lost to the estate. The executor is liable to make good the amount.

This is s. 147 of Act V of 1881. See pp. 374, 388.

PART XLI.

MISCELLANEOUS.

329.—[*Repealed by Act No. VII of* 1870.]

330.—[*Repealed by Act No. XXIV of* 1867.]

331. The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Muhammadan or Buddhist; nor shall they apply to any will made, or any intestacy occurring, before the first day of January, 1886.

The fourth section shall not apply to any marriage contracted before the same day.

See pp. 10, 12, 55, 106.

332. The Governor-General of India in Council shall from time to time have power, by an order, either retrospectively from the passing of this Act, or prospectively, to exempt from the operation of the whole or any part of this Act the members of any race, sect or tribe in British India or any part of such race, sect or tribe, to whom he may consider it impossible or inexpedient to apply the provisions of this Act, or of the part of the Act mentioned in the order.

The Governor-General of India in Council shall also have power from time to time to revoke such order, but not so that the revocation shall have any retrospective effect.

All orders and revocations made under this section shall be published in the *Gazette of India.*

See p. 10, 11, 12, 16, 35, 55, 61, 311, 312.

[333. (1) When a grant of probate or letters of administration is revoked or annulled under this Act, the person to whom the grant was made shall forthwith deliver up the probate or letters to the Court which made the grant.

(2) If such person wilfully and without reasonable cause omits so to deliver up the probate or letters, he shall be punished with fine which may extend to one thousand rupees, or with imprisonment of either description for a term which may extend to three months, or with both.]

This section has been added by s. 18 of Act VI of 1889. A similar section (s. 157) has been added to Act V of 1881 by the same Act. See p. 361.

[SCHEDULE.—*Repealed by Act No. VII of* 1870.]

HINDU WILLS ACT.

ACT NO. XXI of 1870.

(Received the assent of the Governor-General on the 19th July 1870).

An Act to regulate the Wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay.

WHEREAS it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation, and probate of the wills of Hindus, Jainas, Sikhs, and Buddhists in the territories subject to the Lieutenant-Governor of Bengal and in the towns of Madras and Bombay; It is hereby enacted as follows:—

1. This Act may be called "The Hindu Wills Act, 1870."

2. The following portions of the Indian Succession Act, 1865, namely,—

sections forty-six, forty-eight, forty-nine, fifty, fifty-one, fifty-five, and fifty-seven to seventy-seven (both inclusive),

section eighty-two, eighty-three, eighty-five, eighty-eight to one hundred and three (both inclusive),

sections one hundred and six to one hundred and seventy seven (both inclusive).

[*sections one hundred and seventy-nine to one hundred and eight-nine (both inclusive).*

sections one hundred and ninety-one to one hundred and ninety-nine (both inclusive),

so much of Parts XXX and XXXI as relates to grants of probate and letters of administration with the will annexed, and Parts XXXIII or XL (both inclusive), so far as they relate to an executor and an administrator with the will annexed.—Repealed by s. 154 of Act V of 1881] and s. 187.*

shall, notwithstanding anything contained in section three hundred and thirty-one of the said Act, apply—

(*a*) to all wills and codicils made by any Hindu, Jaina, Sikh, or Buddhist, on or after the first day of September one thousand eight hundred and seventy, within the said territories or the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(*b*) to all such wills and codicils made outside those territories and limits, so far as relates to immoveable property situate within those territories or limits:

3. Provided that marriage shall not revoke any such will or codicil;

And that nothing herein contained shall authorize a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which, but for section two of this Act, he could not deprive them by will:

[*And that nothing herein contained shall vest in the executor or administrator with the will annexed of a deceased person any property which such person could not have alienated inter vivos.* —Repealed by s. 154 of Act V of 1881.]

And that nothing herein contained shall affect any law of adoption or intestate succession:

And that nothing herein contained shall authorize any Hindu, Jaina, Sikh, or Buddhist to create in property any interest which he could not have created before the first day of September one thousand eight hundred and seventy.

4. On and from that day, section two of Bengal Regulation V of 1799 shall be repealed so far as relates to the executors of persons who are not Muhammadans, but are subject to the jurisdiction of a District Court in the territories subject to the Lieutenant-Governor of Bengal.

5. Nothing contained in this Act shall affect the rights, duties and privileges of the Administrators-General of Bengal, Madras, and Bombay, respectively.

6. In this Act and in the said sections and Parts of the Indian Succession Act, all words defined in section three of the same Act shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning as the said section three has attached to such words respectively:

And in applying sections sixty-two, sixty-three, ninety-two, ninety-six, ninety-eight, ninety-nine, one hundred, one hundred and one, one hundred and two [*one hundred and three, and one hundred and eighty-two.*—Repealed by s. 154 of Act V of 1881] and one hundred and three† of the said Succession Act to wills and codicils made under this Act, the words "son,"

* See s. 154 of Act V of 1881.

† See s. 154 of Act V of 1881.

"sons," "child," and "children" shall be deemed to include an adopted child; and the word "grand-children" shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural-born; and the expression "daughter-in law" shall be deemed to include the wife of an adopted son:

And in making grants under this Act, of letters of administration with the will annexed, section one hundred and ninety-five of the said Succession Act shall be construed as if the words "and in case the Hindu Wills Act had not been passed" were added thereto; and section one hundred and ninety-eight of the said Succession Act shall be construed as if, after the word "intestate," the words "and the Hindu Wills Act had not been passed" were inserted; and sections two hundred and thirty and two hundred and thirty-one of the said Succession Act shall be construed as if the words "if the Hindu Wills Act had not been passed" were added thereto, respectively.

THE PROBATE AND ADMINISTRATION ACT.

No. V of 1881.

(*Received the assent of the Governor-General on the 21st January* 1881.)

An Act to provide for the grant of Probates of Wills and Letters of Administration to the estates of certain deceased persons.

WHEREAS it is expedient to provide for the grant of probate of wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act, 1865, does not apply; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

1. This Act may be called "The Probate and Administration Act, 1881:"

It applies to the whole of British India;

and it shall come into force on the first day of April, 1881.

See p. 54.

2. Chapters II to XIII, both inclusive, of this Act shall apply in the case of every Hindu, Muhammadan, Buddhist, and person exempted under section 332 of the Indian Succession Act, 1865, dying before, on, or after the said first day of April, 1881:

Provided that nothing herein contained shall be deemed to render invalid any transfer of property duly made before that day:

Provided also that, except in cases to which the Hindu Wills Act, 1870, applies, no Court in any local area beyond the limits of the towns of Calcutta, Madras, and Bombay and the territories for the time being administered by the Chief Commissioner of *Lower** Burma, and no High Court in exercise of the concurrent jurisdiction over such local area hereby conferred, shall receive applications for probate or letters of administration until the Local Government has, with the previous sanction of the Governor-General in Council, by a notification† in the official Gazette, authorized it so to do.

See pp. 9, 15, 311, 325, 326.

3. In this Act, unless there be something repugnant in the subjects or contest,—

'Province' includes any division of British India having a Court of the last resort:

'Minor' means any person subject to the Indian Majority Act, 1875, who has not attained his majority within the meaning of that Act, and any other person who has not completed his age of eighteen years; and 'minority' means the status of any such person:

See s. 2 of the Indian Majority Act, IX of 1875.

'Will' means the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death:

'Codicil' means an instrument made in relation to a will, and explaining, altering or adding to its dispositions. It is considered as forming an additional part of the will:

See s. 3 of the Indian Succession Act.

'Specific legacy' means a legacy of specified property:

'Demonstrative legacy' means a legacy directed to be paid out of specified property:

These definitions of 'specific legacy' and 'demonstrative legacy' are taken from s. 137 (expln.) of the Indian Succession Act, p. 171, *ante*.

'Probate' means the copy of a will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator:

'Executor' means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided:

'Administrator' means a person appointed by competent authority to administer the estate of a deceased person when there is no executor: and

See s. 3 of the Indian Succession Act.

'District Judge' means a principal Civil Court of original jurisdiction.

See s. 3 of the Indian Succession Act.

* See Act XX of 1886.

† See ante pp. 325, 326 for Notifications published under this section.

CHAPTER II.

OF GRANT OF PROBATE AND LETTERS OF ADMINISTRATION.

4. The executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such. But nothing herein contained shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person.

The first part of this section is s. 179 of the Indian Succession Act. The proviso is new. See pp. 41, 313, 323, 325, 343, 355, 370, 371.

5. When a will has been proved and deposited in a Court of competent jurisdiction, situated beyond the limits of the Province, whether in the British dominions, or in a foreign country, and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed.

This is s. 180 of the Indian Succession Act.* See *ante*, pp. 312, 322.

6. Probate can be granted only to an executor appointed by the will.

This is s. 181 of the Indian Succession Act. See *ante*, pp. 274, 315.

7. The appointment may be express or by necessary implication.

Illustrations.

(*a.*) A wills that C be his executor if B will not. B is appointed executor by implication.

(*b.*) A gives a legacy to B and several legacies to other persons, among the rest, to his daughter-in-law, C, and adds, "but should the within-named C be not living, I do constitute and appoint B my whole and sole executrix." C is appointed executrix by implication.

(*c.*) A appoints several persons executors of his will and codicils, and his nephew residuary legatee, and in another codicil are these words:—"I appoint my nephew my residuary legatee to discharge all lawful demands against my will and codicils, signed of different dates." The nephew is appointed an executor by implication.

This is s. 182 of the Indian Succession Act. See *ante*, pp. 315, 318.

8. Probate cannot be granted to any person who is a minor or is of unsound mind.

This is s. 183 of the Indian Succession Act, omitting the words 'nor to a married woman without the consent of her husband.' See *ante*, pp 315, 316, 317, 372.

9. When several executors are appointed, probate may be granted to them all simultaneously or at different times.

Illustration.

A is an executor of B's will by express appointment, and C an executor of it by implication. Probate may be granted to A and C at the same time, or to A first, and then to C, or to C first, then to A.

This is s. 184 of the Indian Succession Act. See pp. 320, 402, *ante*.

10. If a codicil be discovered after the grant of probate, a separate probate of that codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the will.

If different executors are appointed by the codicil, the probate of the will must be revoked, and a new probate granted of the will and the codicil together.

This is s. 185 of the Indian Succession Act. See pp. 321, 346, 382, *ante*.

11. When probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors.

This is s. 186 of the Indian Succession Act. See *ante*, pp. 322, 402.

12. Probate of a will, when granted, establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such.

This is s. 188 of the Indian Succession Act. See *ante*, pp. 324, 360.

Sections 187 and 190 of the Indian Succession Act, which make it compulsory to obtain probate or administration, have not been incorporated in this Act. The former is still embodied in the Hindu Wills Act.

13. Letters of administration cannot be granted to any person who is a minor or is of unsound mind.

This is s. 189 of the Indian Succession Act, omitting the words 'nor to a married woman without the previous consent of her husband.' See p. 331.

14. Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death.

* Section 180 was originally embodied in the Hindu Wills Act, but now, by s. 154 of this Act, ss. 180—189, inclusive, with the exception of s. 187, (which has been retained), 191—199 (inclusive), and Parts XXX and XXXI and Parts XXXIII to XL (both inclusive) so far as they were made applicable, have been taken out of the Hindu Wills Act, it being no longer necessary to retain them.

This is s. 191 of the Indian Succession Act. Section 190 of the Indian Succession Act, which makes it compulsory to take out administration, has been omitted from this Act.

15. Letters of administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate.

This is s. 192 of the Indian Succession Act.

16. When a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued calling upon the executor to accept or renounce his executorship;

except that, when one or more of several executors has or have proved a will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved.

This is s. 193 of the Indian Succession Act. See pp. 326, 333, *ante*.

17. The renunciation may be made orally in the presence of the Judge, or by a writing signed by the person renouncing, and when made shall preclude him from ever thereafter applying for probate of the will appointing him executor.

This is s. 194 of the Indian Succession Act. See p. 327, *ante*.

18. If the executor renounce, or fail to accept, the executorship within the time limited for the acceptance or refusal thereof, the will may be proved and letters of administration with a copy of the will annexed may be granted to the person who would be entitled to administration in case of intestacy.

This is s. 195 of the Indian Succession Act. See *ante*, pp. 327, 328, 329. As to the persons entitled to administration, see s. 23, *infra*.

19. When the deceased has made a will, but has not appointed an executor, or when he has appointed an executor who is legally incapable or refuses to act, or has died before the testator, or before he has proved the will, or

when the executor dies after having proved the will but before he has administered all the estate of the deceased,

an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.

This is s. 196 of the Indian Succession Act. See pp. 330, 334, *ante*. See s. 45, *infra*.

20. When a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been fully administered, his representative has the same right to administration with the will annexed as such residuary legatee.

This is s. 197 of the Indian Succession Act. See p. 331, *ante*.

21. When there is no executor and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.

This is s. 198 of the Indian Succession Act; see *ante*, p. 331. See Act II of 1874, ss. 15 and 20, as to the right of the Administrator-General to letters of administration.

22. Letters of administration with the will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next-of-kin to accept or refuse letters of administration.

This is s. 199 of the Indian Succession Act. See *ante*, pp. 332, 336. As to 'next-of-kin,' see Administrator-General's Act, II of 1874, s. 3.

23. When the deceased has died intestate, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

When several such persons apply for administration, it shall be in the discretion of the Court to grant it to any one or more of them.

When no such person applies, it may be granted to a creditor of the deceased.

The sections of the Indian Succession Act, which determine the persons to whom, under that Act, administration may be granted, are ss. 200-207. See *ante*, pp. 327, 328, 329.

CHAPTER III.

OF LIMITED GRANTS.

(*a.*)—*Grants limited in duration.*

24. When the will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator and a copy or the draft of the

will has been preserved, probate may be granted of such copy or draft, limited until the original, or a properly authenticated copy of it be produced.

This is s. 208 of the Indian Succession Act. See *ante*, p. 333.

25. When the will has been lost or destroyed, and no copy has been made, nor the draft preserved, probate may be granted of its contents, if they can be established by evidence.

This is s. 209 of the Indian Succession Act.

26. When the will is in the possession of a person residing out of the province in which application for probate is made, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will, or an authenticated copy of it, be produced.

This is s. 210 of the Indian Succession Act. See *ante*, p. 334.

27. Where no will of the deceased is forthcoming, but there is reason to believe that their is a will in existence, letters of administration may be granted, limited until the will, or an authenticated copy of it, be produced.

This is s. 211 of the Indian Succession Act. See *ante*, p. 334.

(*b.*) *Grants for the Use and Benefit of others having Right.*

28. When any executor is absent from the province in which application is made, and there is no executor within the province willing to act, letters of administration with the will annexed may be granted to the agent of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

This is s. 212 of the Indian Succession Act, the word 'agent' being substituted for that of 'attorney.' See *ante*, pp. 335, 376.

29 When any person to whom, if present, letters of administration with the will annexed might be granted, is absent from the province, letters of administration with the will annexed may be granted to his agent, limited as abovementioned.

This is s. 213 of the Indian Succession Act, the word 'agent' being substituted for that of 'attorney.' See *ante*, p. 335.

30. When a person entitled to administration in case of intestacy is absent from the province, and no person equally entitled is willing to act, letters of administration may be granted to the agent of the absent person, limited as before mentioned.

This is s. 214 of the Indian Succession Act, the word 'agent' being substituted for that of 'attorney.' See *ante*, p. 336.

31. When a minor is sole executor or sole residuary legatee, letters of administration with the will annexed may be granted to the legal guardian of such minor, or to such other person as the Court shall think fit, until the minor has attained his majority, at which period, and not before, probate of the will shall be granted to him.

This is s. 215 of the Indian Succession Act. See pp. 315, 337, 401.

32. When there are two or more minor executors and no executor who has attained majority, or to or more residuary legatees and no residuary legatee who has attained majority, the grant shall be limited until one of them has attained his majority.

This is s. 216 of the Indian Succession Act, except that the words 'has attained his majority' have been substituted for 'have completed the age of eighteen years.' See *ante*, pp. 316, 337, 401.

33. If a sole executor or a sole universal or residuary legatee, or a person who would be solely entitled to the estate of the intestate according to the rule for the distribution of intestate's estates, applicable in the case of the deceased, be a minor or lunatic, letters of administration with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority, or, if there be no such person, to such other person, as the Court thinks fit to appoint, for the use and benefit of the minor or lunatic, until he attains majority or becomes of sound mind, as the case may be.

This is s. 217 of the Indian Succession Act, with an alteration including minors as well as lunatics. See *ante*, pp. 317, 337, 401.

34. Pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate; and every such administrator shall be subject to the immediate control of the Court and shall act under its direction.

This is s. 218 of the Indian Succession Act. See *ante*, p. 338.

(c.)—*For Special Purposes.*

35. If an executor be appointed for any limited purpose specified in the will, the probate shall be limited to that purpose, and if he should appoint an agent to take administration on his behalf, the letters of administration with the will annexed shall accordingly be limited.

This is s. 219 of the Indian Succession Act, the word 'agent' being substituted for 'attorney.' See *ante*, p. 338.

36. If an executor appointed generally give an authority to an attorney to prove a will on his behalf, and the authority is limited to a particular purpose, the letters of administration with the will annexed shall be limited accordingly.

This is s. 220 of the Indian Succession Act. See *ante*, p. 339.

37. Where a person dies, leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his behalf.

This is s. 221 of the Indian Succession Act, with a slight verbal alteration.

38. When it is necessary that the representative of a person deceased be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the said suit, and until a final decree shall be made therein and carried into complete execution.

This is s. 222 of the Indian Succession Act.

39. If, at the expiration of twelve months from the date of any probate or letters of administration, the executor or administrator to whom the same has or have been granted is absent from the province within which the Court that has granted the probate or letters of administration is situate, such Court may grant, to any person whom it thinks fit, letters of administration limited to the purpose of becoming and being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect.

This is s. 223 of the Indian Succession Act. See *ante*, p 339.

40. In any case in which it appears necessary for preserving the property of a deceased person, the Court within whose district any of the property is situate may grant, to any person whom such Court thinks fit, letters of administration limited to the collection and preservation of the property of the deceased, and giving discharges for debts due to his estate, subject to the directions of the Court.

This is s. 224 of the Indian Succession Act. See *ante*, p. 340.

41. When a person has died intestate, or leaving a will of which there is no executor willing and competent to act, or where the executor is, at the time of the death of such person, resident out of the Province, and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof other than the person who, under ordinary circumstances, would be entitled to a grant of administration, the Judge may, in his discretion, having regard to consanguinity, amount of interest, the safety of the estate, and probability that it will be properly administered, appoint such person as he thinks fit to be administrator;

and in every such case letters of administration may be limited or not as the Judge thinks fit.

This is s. 225 of the Indian Succession Act. See *ante*, p. 340.

(d.)—*Grants with Exception.*

42. Whenever the nature of the case requires that an exception be made, probate of a will or letters of administration with the will annexed, shall be granted subject to such exception.

This is s. 226 of the Indian Succession Act. See *ante*, p. 342.

43. Whenever the nature of the case requires that an exception be made, letters of administration shall be granted subject to such exception.

This is s. 227 of of the Indian Succession Act. See *ante*, p. 343.

(e.)—*Grants of the Rest.*

44. Whenever a grant, with exception, of probate or letters of administration, with or without the will annexed, has been made, the person entitled to probate or administration of the remainder of the deceased's estate may take a grant of probate or letters of administration as the case may be, of the rest of the deceased's estate.

This is s. 228 of the Indian Succession Act. See *ante*, p. 344.

(f.)—Grants of Effects unadministered.

45. If the executor to whom probate has been granted has died leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate.

This is s. 229 of the Indian Succession Act. See pp. 330, 344, *ante*.

46. In granting letters of administration of an estate not fully administered, the Court shall be guided by the same rules as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made.

This is s. 230 of the Indian Succession Act. See *ante*, p. 344.

47. When a limited grant has expired by effluxion of time, or the happening of the event or contingency on which it was limited, and there is still some part of the deceased's estate unadministered, letters of administration shall be granted to those persons to whom original grants might have been made.

This is s. 231 of the Indian Succession Act. See p. 344, *ante*.

CHAPTER IV.

ALTERATION AND REVOCATION OF GRANTS.

48. Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the Court, and the grant of probate or letters of administration may be altered and amended accordingly.

This is s. 232 of the Indian Succession Act. See *ante*, p. 345.

49. If, after the grant of letters of administration with the will annexed, a codicil be discovered, it may be added to the grant on due proof and identification, and the grant altered and amended accordingly.

This is s. 233 of the Indian Succession Act. See *ante*, p. 346.

50. The grant of probate or letters of administration may be revoked or annulled for just cause.

Explanation.—Just cause is—

1st, that the proceedings to obtain the grant were defective in substance;

2nd, that the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case;

3rd, that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant though such allegation was made in ignorance or inadvertently;

4th, that the grant has become useless and inoperative through circumstances.

[*5th*, that the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Act, or has exhibited under that Chapter an inventory or account which is untrue in a material respect."—*Inserted by s.* 11 *of Act VI of* 1889.]

Illustrations.

(*a.*) The Court by which the grant was made had no jurisdiction.

(*b.*) The grant was made without citing parties who ought to have been cited.

(*c.*) The will of which probate was obtained was forged or revoked.

(*d.*) A obtained letters of administration to the estate of B, as his widow, but it has since transpired that she was never married to him.

(*e.*) A has taken administration to the estate of B as if he had died intestate, but a wil has since been discovered.

(*f.*) Since probate was granted, a later will has been discovered.

(*g.*) Since probate was granted, a codicil has been discovered, which revokes or adds to the appointment of executors under the will.

(*h.*) The person to whom probate was, or letters of administration were, granted has subsequently become of unsound mind.

This section, as amended by s. 11 of Act VI of 1889, is s. 234 of the Indian Succession Act as amended by the same Act. See *ante*, pp. 346, 347, 358.

CHAPTER V.

OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION.

51. The District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district.

This is s. 235 of the Indian Succession Act. See *ante*, p. 351.

52. The High Court may, from time to time, appoint such judicial officers within any district as it thinks fit to act for the District Judge as Delegates to grant probate and letters of administration in non-contentious cases, within such local limits as it may from time to time prescribe:

Provided that, in the case of High Courts not established by Royal Charter, such appointment be made with the previous sanction of the Local Government.

Persons so appointed shall be called 'District Delegates.'

This is s. 235A of the Indian Succession Act, in which it was inserted by s. 2 of the District Delegates Act, VI of 1881. See *ante*, p. 352.

53. The District Judge shall have the like powers and authority in relation to the granting of probate and letters of administration, and all matters connected therewith, as are by law vested in him, in relation to any civil suit or proceeding depending in his Court.

This is s 236 of the Indian Succession Act. See *ante*, p. 352.

54. The District Judge may order any person to produce and bring into Court any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person;

and if it be not shown that any such paper or writing is in the possession or under the control of such person, but there is reason to believe that he has the knowledge of any such paper or writing, the Court may direct him to attend for the purpose of being examined respecting the same,

and he shall be bound to answer such questions as may be put to him by the Court, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like punishment under the Indian Penal Code, in case of default in not attending or in not answering such questions or not bringing in such paper or writing as he would have been subject to in case he had been a party to a suit, and had made such default,

and the costs of the proceeding shall be in the discretion of the Judge.

This is s. 237 of the Indian Succession Act. See *ante*, p. 353.

55. The proceedings of the Court of the District Judge, in relation to the granting of probate and letters of administration, shall, except as hereinafter otherwise provided, be regulated, so far as the circumstances of the case will admit, by the Code of Civil Procedure.

This is s. 238 of the Indian Succession Act. See *ante*, p. 352.

56. Probate of the will or letters of administration to the estate of a deceased person may be granted by the District Judge under the seal of his Court, if it appears by a petition, verified as hereinafter mentioned, of the person applying for the same that the testator or intestate, as the case may be, had at the time of his decease a fixed place of abode, or any property, moveable or immoveable, within the jurisdiction of the Judge.

This is s. 240 of the Indian Succession Act. See *ante*, p 353.

57. When the application is made to the Judge of a District in which the deceased had no fixed abode at the time of his death, the Judge may, in his discretion, refuse the application, if in his judgment it could be disposed of more justly or conveniently in another district, or, where application is for letters of administration, grant them absolutely, or limited to the property within his own jurisdiction.

This is s. 241 of the Indian Succession Act. See *ante*, p. 353.

58. Probate and letters of administration may, upon application for that purpose to any District Delegate, be granted by him in any case in which there is no contention, if it appears by petition (verified as hereinafter mentioned) that the testator or intestate, as the case may be, at the time of his death had his fixed place of abode within the jurisdiction of such Delegate.

This is s. 241A of the Indian Succession Act, to which it was added by s. 3 of the District Delegates Act, VI of 1881. See *ante*, p. 353.

59. Probate or letters of administration shall have effect over all the property, moveable or immoveable, of the deceased throughout the province in which the same is granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted:

Provided that probates and letters of administration granted by a High Court established by Royal Charter, or by the Chief Court of the Panjáb, or by the Court of the Recorder of Rangoon, shall, unless otherwise directed by the grant, have like effect throughout the whole of British India.

The first part of this section is s. 242 of the Indian Succession Act. To s. 242, the following proviso was added by Act XIII of 1875, s. 2:

"Provided that probates and letters of administration granted by a High Court after the first day of April, 1875, shall, unless otherwise directed by the grant, have like effect throughout the whole of British India."

That proviso was further added to, or explained by, s. 1 of Act II of 1874, so as to correspond with the proviso to this section.

See pp. 323, 325, 350, 356, *ante*.

60. Whenever a grant of probate or letters of administration is made by a Court with such effect as last aforesaid, the Registrar, or such other officer as the Court making the grant appoints in this behalf, shall send to each of the other Courts empowered to make such grants a certificate to the following effect:—

I, A B., Registrar [*or as the case may be*] of the High Court of Judicature at [*or as the case may be*], hereby certify that, on the day of 188 , the High Court of Judicature at [*or as the case may be*] granted probate of the will [*or* letters of administration of the estate of C. D., late of , deceased, to E. F. of and G. H. of , and that such probate [*or* letters] has [*or* have] effect over all the property of the deceased throughout the whole of British India;

and such certificate shall be filed by the Court receiving the same.

This section makes the same provision for the transmission of a certificate by any Court granting unlimited probate or letters of administration as was made by s. 242A, of the Succession Act, in case of a High Court granting such probate or letters. See *ante*, pp. 355, 356.

61. The application for probate or letters of administration, if made and verified in the manner hereinafter mentioned, shall be conclusive for the purpose of authorizing the grant of probate or administration, and no such grant shall be impeached by reason that the testator or intestate had no fixed place of abode, or no property within the district at the time of his death, unless, by a proceeding to revoke the grant if obtained by a fraud upon the Court.

This is s. 243 of the Indian Succession Act. See *ante*, p. 353.

62. Application for probate or for letters of administration with the will annexed shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the will, or, in the cases mentioned in sections twenty four, twenty-five and twenty-six, a copy, draft or statement of the contents thereof annexed and stating

the time of the testator's death,

that the writing annexed is his last will and testament, or, as the case may be,

that it was duly executed,

the amount of assets which are likely to come to the petitioner's hands;

and, where the application is for probate, that the petitioner is the executor named in the will.

In addition to these particulars, the petition shall further state,

when the application is to the District Judge, that the deceased, at the time of his death, had a fixed place of abode, or had some property situated within the jurisdiction of the Judge; and

when the application is to a District Delegate, that the deceased, at the time of his death, had a fixed place of abode within the jurisdiction of such Delegate.

This is s 244 of the Indian Succession Act, as amended by s. 4 of the District Delegates Act, VI of 1881. See *ante*, pp. 353, 373.

63. In cases wherein the will, copy or draft is written in any language other than English, or than that in ordinary use in proceedings before the Court, there shall be a translation thereof annexed to the petition by a translator of the Court, if the language be one for which a translator is appointed; or, if the will, copy or draft be in any other language, then by any person competent to translate the same, in which case such translation shall be verified by that person in the following manner:—

"I (A. B.) do declare, that I read and perfectly understand the language and character of the original, and that the above is a true and accurate translation thereof"

This is s. 245 of the Indian Succession Act. See *ante*, p. 353.

64. Application for letters of administration shall be made by petition distinctly written as aforesaid, and stating

the time and place of the deceased's death,

the family or other relatives of the deceased, and their respective residences,

the right in which the petitioner claims,

the amount of assets which are likely to come to the petitioner's hands.

In addition to these particulars, the petition shall further state,

when the application is to a District Judge, that the deceased, at the time of his death, had a fixed place of abode or had some property situate within the jurisdiction of the Judge; and,

when the application is to a District Delegate, that the deceased, at the time of his death, had a fixed place of abode within the jurisdiction of such Delegate.

This is s. 246 of the Indian Succession Act, as amended by ss. 4 and 9 of the District Delegates Act, VI of 1881.

65. Every person applying to any of the Courts mentioned in the proviso to section fifty-nine for probate of a will or letters of administration of an estate, intended to have effect throughout British India; shall state in his petition, in addition to the matters respectively required by sections sixty-two and sixty-four, that, to the best of his belief, no application has been made to any other Court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid,

or, where any such application has been made, the Court to which it was made, the person or persons by whom it was made, and the proceeding (if any) had thereon.

And the Court to which any application is made under the proviso to section fifty-nine may, if it think fit, reject the same.

This is s. 246 A of the Indian Succession Act.

66. The petition for probate or letters of administration shall in all cases be subscribed by the petitioner and his pleader, if any, and shall be verified by the petitioner in the following manner or the like effect:—

"I (*A. B.*), the petitioner in the above petition, declare, that what is stated therein is true to the best of my information and belief."

This is s. 247 of the Indian Succession Act. See *ante*, p. 356.

67. Where the application is for probate, or for letters of administration with the will annexed, the petition shall also be verified by at least one of the witnesses to the will (when procurable), in the manner or to the effect following:—

"I (*C. D.*,) one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present and I saw the said testator affix his signature (*or* mark) thereto (*as the case may be*) (*or* that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence)."

This is s. 248 of the Indian Succession Act. See *ante*, p. 356.

68. If any petition or declaration which is hereby required to be verified contains any averment which the person making the verification knows or believes to be false, such person shall be subject to punishment according to the provisions of the law for the time being in force for the punishment of giving or fabricating false evidence.

This is s. 249 of the Indian Succession Act. See *ante*, p. 356.

As to the punishment for giving or fabricating false evidence, see Indian Penal Code, Act XLV of 1860, chap. xi.

69. In all cases it shall be lawful for the District Judge or District Delegate, if he thinks fit,

to examine the petitioner in person upon oath, and also

to require further evidence of the due execution of the will, or the right of the petitioner to the letters of administration, as the case may be, and

to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.

The citation shall be fixed up in some conspicuous part of the Court-house, and also in the office of the Collector of the District, and otherwise published or made known in such manner as the Judge or Delegate issuing the same may direct.

This is s. 250 of the Indian Succession Act, as amended by s. 9 of the District Delegates Act, VI of 1881. See *ante*, pp. 332, 333, 357.

70. Caveats against the grant of probate or letters of administration may be lodged with the District Judge or a District Delegate; and immediately on any caveat being lodged with any District Delegate, he shall send a copy thereof to the District Judge; and immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased had his fixed place of abode at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same.

This section has been substituted by s. 5, of the District Delegates Act, VI of 1881, in the place of the original s. 251 of the Indian Succession Act. See *ante*, p. 358.

71. The caveat shall be to the following effect:—

"Let nothing be done in the matter of the estate of A. B., late of , deceased, who died on the day of at without notice to C. D. of ."

This is s. 252 of the Indian Succession Act. See *ante*, 358.

72. No proceeding shall be taken on a petition for probate or letters of administration after a caveat against the grant thereof has been entered with the Judge or District Delegate to whom the application has been made, or notice thereof has been given of its entry with some other Delegate, until after such notice to the person by whom the same has been entered as the Court shall think reasonable.

This is s. 253 of the Indian Succession Act, as amended by s. 6 of the District Delegates Act, VI of 1881. See *ante*, p. 358.

73. A District Delegate shall not grant probate or letters of administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that probate or letters of administration ought not to be granted in his Court.

Explanation.—By 'contention' is understood the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding.

This is s. 253A of the Indian Succession Act, in which it was inserted by s. 7 of the District Delegates Act, VI of 1881. See *ante*, p. 359.

74. In every case in which there is no contention, but it appears to the District Delegate doubtful whether the probate or letters of administration should or should not be granted, or when any question arises in relation to the grant, or application for the grant, of any probate or letters of administration, the District Delegate may, if he thinks proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter or the application, according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge.

This is s. 253B of the Indian Succession Act, in which it was inserted by s. 7 of the District Delegates Act, VI of 1881. See *ante*, p. 359.

75. In every case in which there is contention, or the District Delegate is of opinion that the probate or letters of administration should be refused in his Court, the petition, with any documents that may have been filed therewith, shall be returned to the person by whom the application was made, in order that the same may be presented to the District Judge; unless the District Delegate thinks it necessary, for the purposes of justice, to impound the same, which he is hereby authorized to do; and in that case the same shall be sent by him to the District Judge.

This is s. 253C of the Indian Succession Act, in which it was inserted by s. 7 of the District Delegates Act, VI of 1881. See *ante*, p. 359.

76. Whenever it appears to the Judge or District Delegate that probate of a will should be granted, he shall grant the same under the seal of his Court in manner following:—

"I, , Judge of the District of , [*or* Delegate appointed for granting probate or letters of administration in (*here insert the limits of the Delegates jurisdiction*)], hereby make known that, on the day of in the year , the last will of , late of , a copy whereof is hereunto annexed, was proved and registered before me, and that administration of the property and credits of the said deceased, and in any way concerning his will, was granted to , the executor in the said will named.

"he having undertaken to administer the same and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may from time to time appoint, and also to render to this Court a true account of the said property and credits within one year from the same date or within such further time as the Court may from time to time appoint."

The day of 18 ."

The portion in inverted commas was substituted for words struck out by s. 12 of Act VI of 1889.

This section as amended by s. 12 of Act, VI of 1889 is s. 254 of the Indian Succession Act, as amended by ss. 8 and 9 of the District Delegates Act, VI of 1881 and by Act, VI of 1889. See *ante*, p. 359.

77. Whenever it appears to the District Judge or District Delegate that letters of administration to the estate of a person deceased, with or without a copy of the will annexed should be granted, he shall grant the same under the seal of his Court in manner following:—

"I , Judge of the District of [*or* Delegate appointed for granting probate or letters of administration in (*here insert the limits of the Delegate's jurisdiction*)], hereby make known that, on the day of , letters of administration (with *or* without the will annexed, *as the case may be*) of the property and credits of late of , deceased, were granted to , the father (*or as the case may be*) of the deceased, [*he having undertaken to administer the same, and to make a true inventory of the said property and credits, and to exhibit the same in this Court at or before the expiration of six months from the date of this grant, and also to render a true account of the said property and credits within one year from the same date.* Struck out by s. 13 of Act V of 1889.]

"he having undertaken to administer the same, and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may from time to time appoint,

and also to render to this Court a true account of the said property and credits within one year from the same date or within such further time as the Court may from time to time appoint."

The day of 18 .

This section, as amended by s. 13 of Act VI of 1889, is s. 255 of the Indian Succession Act, as altered by ss. 8 and 9 of the District Delegates Act, VI of 1881 and by Act VI of 1889. The portion in Italics in brackets [ ] was struck out by Act VI of 1889 and the portion in inverted commas substituted. See *ante*, p. 359.

78. Every person to whom any grant of letters of administration is committed, and, if the Judge so direct, any person to whom probate is granted, shall give a bond to the Judge of the District Court to enure for the benefit of the Judge for the time being with one or more surety or sureties, engaging for the due collection, getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge from time to time by any general or special order directs.

See s. 256 of the Indian Succession Act which differs materially. See *ante*, pp. 359, 360, 374.

79. The Court may, on application made by petition and on being satisfied that the engagement of any such bond has not been kept, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise as the Court may think fit, assign the same to some proper person, who shall thereupon be entitled to sue on the said bond in his own name as if the same had been originally given to him instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount recoverable in respect of any breach thereof.

This is s. 257 of the Indian Succession Act.

80. No probate of a will shall be granted until after the expiration of seven clear days, and no letters of administration shall be granted until after the expiration of fourteen clear days, from the day of the testator or intestate's death.

This is s. 258 of the Indian Succession Act. See *ante*, p. 354.

81. Until a public registry for wills is established, every District Judge and District Delegate shall file and preserve among the records of his Court all original wills of which probate or letters of administration with the will annexed may be granted by him: and the Local Government shall make regulations for the preservation and inspection of the wills so filed as aforesaid.

The corresponding section in the Indian Succession Act is s. 259, the wording of which is slightly different. See *ante*, p. 361.

82. After any grant of probate or letters of administration, no other than the person to whom the same shall have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, throughout the province in which the same may have been granted, until such probate or letters of administration shall have been recalled or revoked.

This is s. 260 of the Indian Succession Act. See *ante*, p. 360.

83. In any case before the District Judge in which there is contention, the proceeding shall take, as nearly as may be, the form of a suit, according to the provisions of the Code of Civil Procedure, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who may have appeared as aforesaid to oppose the grant shall be the defendant.

This is s. 261 of the Indian Succession Act. See *ante*, p. 360.

84. Where any probate is, or letters of administration are, revoked, all payments *bonâ fide* made to any executor or administrator under such probate or administration before the revocation thereof shall, notwithstanding such revocation, be a legal discharge to the person making the same;

and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself out of the assets of the deceased in respect of any payments made by him which the person to whom probate or letters of administration shall be afterwards granted might have lawfully made.

This is s 262 of the Indian Succession Act. See *ante*, p. 361.

85. Notwithstanding anything hereinbefore contained, it shall, except in cases to which the Hindu Wills Act, 1870, applies, be in the discretion of the Court to make an order refusing, for reasons to be recorded by it in writing, to grant any application for letters of administration made under this Act.

This section is new.

86. Every order made by a District Judge or District Delegate by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals.

This is s. 263 of the Indian Succession Act. See *ante*, p. 352.

87. The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

This is s. 264 of the Indian Succession Act. See *ante*, p. 351.

CHAPTER VI.

OF THE POWERS OF AN EXECUTOR OR ADMINISTRATOR.

88. An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same powers for the recovery of debts due to him at the time of his death, as the deceased had when living.

This is s. 267 of the Indian Succession Act with a slight alteration. See *ante*, p. 367.

89. All demands whatever, and all rights to prosecute or defend any suit or other proceeding, existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators, except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party, and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory.

Illustrations.

A collision takes place on a railway in consequence of some neglect or default of the officials, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having instituted any suit. The cause of action does not survive.

This is s. 268 of the Indian Succession Act, omitting illustration (*b*). See *ante*, p. 367.

[90. (1) An executor or administrator has, subject to the provisions of this section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under section 4.

(2) The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order.

(3) An administrator may not, without the previous permission of the Court by which the letters of administration were granted,—

(*a*) mortgage, charge or transfer by sale, gift, exchange or otherwise any immoveable property for the time being vested in him under section 4, or

(*b*) lease any such property for a term exceeding five years.

(4) A disposal of property by an executor or administrator in contravention of sub-section (2) or sub-section (3), as the case may be, is voidable at the instance of any other person interested in the property.

(5) Before any probate or letters of administration is, or are granted under this Act there shall be endorsed thereon or annexed thereto a copy of sub-section (1), (2) and (4), or of sub-sections (1), (3) and (4), as the case may be.

(6) A probate or letters of administration shall not be rendered invalid by reason of the endorsement or annexure required by the last foregoing sub-section not having been made thereon or attached thereto, nor shall the absence of such an endorsement or annexure authorise an executor or administrator to act otherwise than in accordance with the provisions of this section.]

This section has been substituted for the former s. 90* which is repealed by s. 14 of Act

* Section 90 now repealed was as follows:—

90. *An executor or administrator has power, with the consent of the Court by which the probate or letters of administration was or were granted, to dispose of the property of the deceased, either wholly or in part, in such manner as he thinks fit:*

Provided that the Court may, when granting probate or letters of administration, exempt the executor or administrator from the necessity of obtaining such consent as to the whole or any specified part of the assets of the deceased.

Illustrations.

(*a.*) *The deceased has made a specific bequest of part of the property. The executor, not having assented to the bequest, sells the subject of it with the consent of the Court. The sale is valid.*

(*b.*) *The executor, in the exercise of his discretion, mortgages a part of the immoveable estate of the deceased with the consent of the Court. The mortgage is valid.* [Repealed by s. 12 of Act VI of 1889.]

VI of 1889. The section of the Indian Succession Act dealing with the same matter is s. 269. See *ante*, p. 367, 369, 370, 408. See s. 19 of Act VI of 1889.

91. If an executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold.

This is s. 270 of the Indian Succession Act. See *ante*, pp. 371, 408.

92. When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary in the will or grant of letters of administration, be exercised by any one of them who has proved the will or taken out administration.

Illustrations.

(*a.*) One of several executors has power to release a debt due to the deceased.
(*b.*) One has power to surrender a lease.
(*c.*) One has power to sell the property of the deceased, moveable or immoveable.
(*d.*) One has power to assent to a legacy.
(*e.*) One has power to endorse a promissory note payable to the deceased.
(*f.*) The will appoints A, B, C and D to be executors, and directs that two of them shall be a quorum. No act can be done by a single executor.

This is s. 271 of the Indian Succession Act. See *ante*, pp. 320, 371, 372.

93. Upon the death of one or more of several executors or administratorrs, all the powers of the office become, in the absence of any directed to the contrary in the will or grant of letters of administration, vested in the survivors or survivor.

This is s. 272 of the Indian Succession Act. See *ante*, pp. 322, 371, 402.

94. The adminstrator of effects unadministered has, with respect to such effects, the same powers as the original executor or administrator.

This is s. 273 of the Indian Succession Act. See *ante*, p. 372.

95. An administrator during minority has all the powers of an ordinary administer.

This is s. 274 of the Indian Succession Act. See *ante*, p. 337.

96. When probate or letters of administration shall have been granted to a married. woman, she has all the powers of an ordinary executor or adminstrator.

This is s. 275 of the Indian Succession Act. See *ante*, p. 372.

CHAPTER VII.

OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR.

97. It is the duty of an executor to provide funds for the performance of the necessary funeral ceremonies of the deceased in a manner suitable to his condition, if he has left property sufficient for the purpose

While it is the duty of an executor under s. 276 of the Indian Succession Act to perform the funeral of the deceased in a suitable manner, under this section, it is his duty only to provide funds for the performance of the necessary ceremonies. See *ante*, p. 372.

[98. (1) An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the Court which granted the probate or letters may from time to time appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character, and shall in like manner, within one year from the grant or within such further time as the said Court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of.

(2) The High Court may from time to time prescribe the form in which an inventory or account under this section is to be exhibited.

(3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under section 176 of the Indian Penal Code.

(4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under section 193 of that Code.]

This section has been substituted by s. 15 of Act VI of 1889 for the section formerly numbered 98.* It corresponds with s. 277 of the Indian Succession Act. See *ante*, pp. 373, 374.

* Section 98 now repealed was as follows :—

98. *An executor or administrator shall, within six months from the grant of probate or letters of administration, exhibit in the Court by which the same has or have been granted an*

99. In all cases where [*it is sought to obtain a grant*—Repealed by s. 16 of Act VI of 1889] "a grant has been made" of probate or letters of administration intended to have effect throughout the whole of British India, the executor, or [*the person applying for administration*,—Repealed by s. 16 of Act VI of 1889] "administrator" shall include in the inventory of the effects of the deceased all his moveable or immoveable property situate in British India:

And the value of such property situate in each province shall be separately stated in such inventory, and the probate or letters of administration shall be chargeable with a fee corresponding to the entire amount or value of the property affected thereby wheresoever situate within British India.

The words in inverted commas have been substituted for the words in brackets by s. 16 of Act VI of 1889. The corresponding section of the Indian Succession Act in s. 277 A. See *ante*, p. 374.

100. The executor or administrator shall collect, with reasonable diligence, the property of the deceased and the debts that were due to him at the time of his death.

This is s. 278 of the Indian Succession Act. See *ante*, p. 374.

101. Funeral expenses to a reasonable amount, according to the degree and quality of the deceased, and deathbed charges, including fees for medical attendance, and board and lodging for one month previous to his death, are to be paid before all debts.

This is s. 279 of the Indian Succession Act. See *ante*, pp. 375, 380.

102. The expenses of obtaining probate or letters of administration, including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate are to be paid next after the funeral expenses and deathbed charges.

This is s. 280 of the Indian Succession Act. See *ante*, pp. 376, 380.

103. Wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan or domestic servant are next to be paid, and then the other debts of the deceased according to their respective priorities (if any).

This is s. 281 of the Indian Succession Act, with the addition of the words "according to their respective priorities (if any)." See *ante*, p. 376.

104. Save as aforesaid, no creditor is to have a right of priority over another.

But the executor or administrator shall pay all such debts as he knows of, including his own, equally and ratably, as far as the assets of the deceased will extend.

This is s. 282 of the Indian Succession Act, omitting the words "by reason that his debt is secured by an instrument under seal or on any other account," after the words "over another" in the first clause. See *ante*, pp. 366, 376.

105. Debts of every description must be paid before any legacy.

This is s. 285 of the Indian Succession Act. See *ante*, p. 379.

106. If the estate of the deceased is subject to any contingent liabilities, an executor or administrator is not bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.

This is s. 286 of the Indian Succession Act. See *ante*, p. 379.

107. If the assets, after payment of debts, necessary expenses, and specific legacies, are not sufficient to pay all the general legacies in full, the latter shall abate or be diminished in equal proportions;

and, in the absence of any direction to the contrary in the will, the executor has no right to pay one legatee in preference to another, nor to retain any money on account of a legacy to himself or to any person for whom he is a trustee.

This is s. 287 of the Indian Succession Act. See *ante*, p. 380.

108. Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement.

This is s. 288 of the Indian Succession Act. See *ante*, p. 276.

109. Where there is a demonstrative legacy, and the assets are sufficient for the payment of debts and necessary expenses, the legatee has a preferential claim for payment of his legacy out of the fund from which the legacy is directed to be paid until such fund is exhausted, and if, after the fund is exhausted, part of the legacy still remains unpaid, he is entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder.

This is s. 289 of the Indian Succession Act. See *ante*, p. 382.

inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person or persons to which the executor or administrator is entitled in that character and shall, in like manner, within one year from the date aforesaid, exhibit an account of the estate, showing the assets that have come to his hands, and the manner in which they have been applied or disposed of.—Repealed by s. 15 of Act VI of 1889.

110. If the assets are not sufficient to answer the debts and the specific legacies, an abatement shall be made from the latter rateably in proportion to their respective amounts.

Illustrations.

A has bequeathed to B a diamond-ring, valued at 500 rupees, and to C a horse, valued at 1,000 rupees. It is found necessary to sell all the effects of the testator, and his assets, after payment of debts, are only 1,000 rupees Of this sum rupees 333-5-4 are to be paid to B, and rupees 666-10-8 to C.

This is s. 290 of the Indian Succession Act. See *ante*, p. 382.

111. For the purpose of abatement, a legacy for life, a sum appropriated by the will to produce an annuity, and the value of an annuity when no sum has been appropriated to produce it, shall be treated as general legacies.

This is s. 291 of the Indian Succession Act. See *ante*, pp. 300, 381.

CHAPTER VIII.

OF THE EXECUTOR'S ASSENT TO A LEGACY.

112. The assent of the executor is necessary to complete a legatee's title to his legacy.

Illustrations.

(*a.*) A by his will bequeaths to B his Government paper, which is in deposit with the Bank of Bengal. The Bank has no authority to deliver the securities, nor B a right to take possession of them, without the assent of the executor.

(*b.*) A by his will has bequeathed to C his house in Calcutta in the tenancy of B. C is not entitled to receive the rents without the assent of the executor.

This is s. 292 of the Indian Succession Act. See *ante*, pp. 382, 399, 405.

113. The assent of the executor to a specific bequest shall be sufficient to divest his interest as executor therein, and to transfer the subject of the bequest to the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way.

This assent may be verbal, and it may be either express or implied from the conduct of the executor.

Illustrations.

(*a.*) A horse is bequeathed. The executor requests the legatee to dispose of it, or a third party proposes to purchase the horse from the executor, and he directs him to apply to the legatee. Assent to the legacy is implied.

(*b.*) The interest of a fund is directed by the will to be applied for the maintenance of the legatee during his minority. The executor commences so to apply it. This is an assent to the whole of the bequest.

(*c.*) A bequest is made of a fund to A, and after him to B. The executor pays the interest of the fund to A. This is an implied assent to the bequest to B.

(*d.*) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed.

(*e.*) A person to whom a specific article has been bequeathed takes possession of it and retains it without any objection on the part of the executor. His assent may be presumed.

This is s. 293 of the Indian Succession Act. See *ante*, pp. 369, 382, 383, 405.

114. The assent of an executor to a legacy may be conditional, and if the condition be one which he has a right to enforce, and it is not performed, there is no assent.

Illustrations.

(*a.*) A bequeaths to B his lands of Sultanpur, which, at the date of will, and at the death of A, were subject to a mortgage for 10,000 rupees. The executor assents to the bequest on condition that B shall, within a limited time, pay the amount due on the mortgage at the testator's death. The amount is not paid. There is no assent.

(*b.*) The executor assents to a bequest on condition that the legatee shall pay him a sum of money. The payment is not made. The assent is nevertheless valid.

This is s. 294 of the Indian Succession Act. See *ante*, p. 382.

115. When the executor is a legatee, his assent to his own legacy is necessary to complete his title to it, in the same way as it is required when the bequest is to another person, and his assent may in like manner be express or implied.

Assent shall be implied if in his manner of administering the property he does any act which is referable to his character of legatee and is not referable to his character of executor.

Illustration.

An executor takes the rent of a house or the interest of Government securities bequeathed to him, and applies it to his own use. This is assent.

This is s. 295 of the Indian Succession Act. See *ante*, p. 382.

116. The assent of the executor to a legacy gives effect to it from the death of the testator.

Illustrations.

(*a.*) A legatee sells his legacy before it is assented to by the executor. The executor's subsequent assent operates for the benefit of the purchaser, and completes his title to the legacy.

(*b.*) A bequeaths 1,000 rupees to B with interest from his death. The executor does not assent to this legacy until the expiration of a year from A's death. B is entitled to interest from the death of A.

This is s. 296 of the Indian Succession Act. See *ante*, p. 383.

117. An executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death.

Illustration.

A by his will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year.

This is s. 297 of the Indian Succession Act. See *ante*, p. 383.

CHAPTER IX.

OF THE PAYMENT AND APPORTIONMENT OF ANNUITIES.

118. Where an annuity is given by the will, and no time is fixed for its commencement, it shall commence from the testator's death, and the first payment shall be made at the expiration of a year next after that event.

This is s. 298 of the Indian Succession Act. See *ante*, p. 388.

119. Where there is a direction that the annuity shall be paid quarterly or monthly, the first payment shall be due at the end of the first quarter or first month, as the case may be, after the testator's death, and shall, if the executors think fit, be paid when due; but the executor shall not be bound to pay it till the end of the year.

This is s. 299 of the Indian Succession Act. See *ante*, p. 301.

120. Where there is a direction that first payment of an annuity shall be made within one month or any other division of time from the death of the testator, or on a day certain, the successive payments are to be made on the anniversary of the earliest day on which the will authorizes the first payment to be made;

and if the annuitant dies in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative.

This is s. 300 of the Indian Succession Act. See *ante*, p. 301.

CHAPTER X.

OF THE INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES.

121. Where a legacy, not being a specific legacy, is given for life, the sum bequeathed shall, at the end of the year, be invested in such securities as the High Court may, by any general rule to be made from time to time, authorize or direct, and the proceeds thereof shall be paid to the legatee as the same shall accrue due.

This is s. 301 of the Indian Succession Act. See *ante*, pp. 301, 386.

122. Where a general legacy is given to be paid at a future time, the executor shall invest a sum sufficient to meet it in securities of the kind mentioned in the last preceding section.

The intermediate interest shall form part of the residue of the testator's estate.

This is s. 302 of the Indian Succession Act. See *ante*, p. 386.

123. Where an annuity is given, and no fund is charged with its payment or appropriated by the will to answer it, a Government annuity of the specified amount shall be purchased, or,

if no such annuity can be obtained, then a sum sufficient to produce the annuity shall be invested for that purpose in such securities as the High Court may, by any general rule to be made from time to time, authorize or direct.

This is s. 303 of the Indian Succession Act. See *ante*, p. 301.

124. Where a bequest is contingent, the executor is not bound to invest the amount of the legacy, but may transfer the whole residue of the estate to the residuary legatee (if any) on his giving sufficient security for the payment of the legacy if it shall become due.

This is s. 304 of the Indian Succession Act. See *ante*, p. 386.

125. Where the testator has bequeathed the residue of his estate to a person for life, with a direction that it shall be invested in certain specified securities, so much of the estate as is not at the time of his death invested in securities of the specified kind shall be converted into money and invested in such securities.

This is s. 306 of the Indian Succession Act. See *ante*, p. 386.

126. Such conversion and investment as are contemplated by the last preceding section shall be made at such times and in such manner as the executor in his discretion thinks fit:

and, until such conversion and investment shall be completed, the person who would be for the time being entitled to the income of the fund when so invested shall receive interest at the rate of six per cent. per annum upon the market-value (to be computed as of the date of the testator's death) of such part of the fund as shall not yet have been so invested.

This is s. 307 of the Indian Succession Act, the rate of interest, however, being altered from 4 per cent. to 6 per cent.

See *ante*, p. 386.

127. Where, by the terms of a bequest, the legatee is entitled to the immediate payment or possession of the money or thing bequeathed, but is a minor, and there is no direction in the will to pay it to any person on his behalf, the executor or administrator shall pay or deliver the same into the Court of the District Judge by whom, or by whose District Delegate, the probate was, or letters of administration with the will annexed were, granted, to the account of the legatee, unless the legatee be a ward of the Court of Wards; and, if the legatee be a ward of the Court of Wards, the legacy shall be paid into that Court to his account;

and such payment into the Court of the District Judge, or into the Court of Wards, as the case may be, shall be a sufficient discharge for the money so paid;

and such money, when paid in, shall be invested in the purchase of Government securities, which, with the interest thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, as the Judge or the Court of Wards, as the case may be, may direct.

This is s. 308 of the Indian Succession Act. See *ante*, p. 386. See s. 32 of Act XVIII of 1864 (The Official Trustee's Act).

CHAPTER XI.

OF THE PRODUCE AND INTEREST OF LEGACIES.

128. The legatee of a specific legacy is entitled to the clear produce thereof, if any, from the testator's death.

Exception.—A specific bequest, contingent in its terms, does not comprise the produce of the legacy between the death of the testator and the vesting of the legacy.

The clear produce of it forms part of the residue of the testator's estate.

Illustrations.

(*a.*) A bequeaths his flock of sheep to B. Between the death of A and delivery by his executor the sheep are shorn, or some of the ewes produce lambs. The wool and lambs are the property of B.

(*b.*) A bequeaths his Government securities to B, but postpones the delivery of them till the death of C. The interest which falls due between the death of A and the death of C belongs to B, and must, unless he is a minor, be paid to him as it is received.

(*c.*) The testator bequeaths all his four per cent. Government promissory notes to A when he shall complete the age of 18. A, if he complete that age, is entitled to receive the notes, but the interest which accrues in respect of them, between the testator's death and A's completing 18, forms part of the residue.

This is s. 309 of the Indian Succession Act. See *ante*, pp. 277, 283, 387.

129. The legatee under a general residuary bequest is entitled to the produce of the residuary fund from the testator's death.

Exception.—A general residuary bequest contingent in its terms does not comprise the income which may accrue upon the fund bequeathed between the death of the testator and the vesting of the legacy.

Such income goes as undisposed of.

Illustrations.

(*a*) The testator bequeaths the residue of his property to A, a minor, to be paid to him when he shall complete the age of 18. The income from the testator's death belong to A.

(b) The testator bequeaths the residue of his property to A when he shall complete the age of 18. A, if he complete that age, is entitled to receive the residue. The income which has accrued in respect of it since the testator's death goes as undisposed of.

This is s. 310 of the Indian Succession Act. See *ante*, p. 387.

130. Where no time has been fixed for the payment of a general legacy, interest begins to run from the expiration of one year from the testator's death.

Exception.—(1.) Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator.

(2) Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, the legacy shall bear interest from the death of the testator.

(3) Where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it interest is payable from the death of the testator.

This is s. 311 of the Indian Succession Act. See *ante*, p. 387.

131. Where a time has been fixed for the payment of a general legacy, interest begins to run from the time so fixed.

The interest up to such time forms part of the residue of the testator's estate.

Exception.—Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, and the legatee is a minor, the legacy shall bear interest from the death of the testator, unless a specific sum is given by the will for maintenance, or unless the will contains a direction to the contrary.

This is s. 312 of the Indian Succession Act. See *ante*, p. 388.

132. The rate of interest shall be six per cent. per annum.

In the corresponding section (313) of the Indian Succession Act, the rate of interest is *four* per cent. See p 388.

133. No interest is payable on the arrears of an annuity within the first year from the death of the testator, although a period earlier than the expiration of that year may have been fixed by the will for making the first payment of the annuity.

This is s. 314 of the Indian Succession Act. See *ante*, p. 388.

134. Where a sum of money is directed to be invested to produce an annuity, interest is payable on it from the death of the testator

This is s. 315 of the Indian Succession Act. See *ante*, p. 388.

CHAPTER XII.

OF THE REFUNDING OF LEGACIES.

135. An executor who has paid a legacy under the order of a Judge, is entitled to call upon the legatee to refund in the event of the assets proving insufficient to pay all the legacies.

This is s. 316 of the Indian Succession Act. See *ante*, p. 383.

136. When an executor has voluntarily paid a legacy, he cannot call upon a legatee to refund in the event of the assets proving insufficient to pay all the legacies.

This is s. 317 of the Indian Succession Act See *ante*, pp. 380, 384.

137. When the time prescribed by the will for the performance of a condition has elapsed, without the condition having been performed, and the executor has thereupon, without fraud, distributed the assets; in such case, if further time has, under the second clause of this section, been allowed for the performance of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the executor, but those to whom he has paid it are liable to refund the amount.

Where the will requires an act to be performed by the legatee within a specified time, either as a condition to be fulfilled before the legacy is enjoyed, or as a condition upon the non-fulfilment of which the subject-matter of the bequest is to go over to another person, or the bequest is to cease to have effect, the act must be performed within the time specified, unless the performance of it be prevented by fraud, in which case such further time shall be allowed as is requisite to make up for the delay caused by such fraud.

This section embodies ss. 318 and 124 of the Indian Succession Act. See *ante*, p. 264.

138. When the executor has paid away the assets in legacies, and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion.

This is s. 319 of the Indian Succession Act. See *ante*, p. 383.

Where an executor or administrator has given such notices as the High Court may, by any general rule to be made from time to time, prescribe, for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of time therein named for sending in claims, be at liberty to distribute the assets, or any part thereof, in discharge of such lawful claims as he knows of, and shall not be liable for the assets

so distributed to any person of whose claim he has not had notice at the time of such distribution;

but nothing herein contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of the persons who may have received the same respectively.

This is s. 320 of the Indian Succession Act, with a slight alteration as to the notices to be given. Under the Succession Act, the notices instead of being such as the "High Court may, by any general rule to be made from time to time prescribe," are to be such as would have been given by the High Court in an adminstration-suit. See *ante*, p. 384.

140. A creditor who has not received payment of his debt may call upon a legatee who has received payment of his legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies, and whether the payment of the legacy by the executor was voluntary or not.

This section corresponds with s. 321 of the Indian Succession Act. See *ante*, p. 384.

See Act XV of 1877, sched. ii, art. 43.

141. If the assets were sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy, or who has been compelled to refund under the last preceding section, cannot oblige one who has received payment in full to refund, whether the legacy were paid to him with or without suit, although the assets have subsequently become deficient by the wasting of the executor.

This is s. 322 of the Indian Succession Act. See *ante*, p. 384.

142. If the assets were not sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy must, before he can call on a satisfied legatee to refund, first proceed against the executor if he is solvent; but, if the executor is insolvent or not liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion.

This is s. 323 of the Indian Succession Act. See *ante*, p. 384. See also s. 136 of this Act, *supra*, p. 370.

143. The refunding of one legatee to another shall not exceed the sum by which the satisfied legacy ought to have been properly administered.

Illustration.

A has bequeathed 240 rupees to B, 480 rupees to C, and 720 rupees to D. The assets are only 1,000 rupees, and if properly administered would give 200 rupees to B, 400 rupees to C, and 600 rupees to D. C and D have been paid their legacies in full, leaving nothing to B. B can oblige C to refund 80 rupees, and D to refund 120 rupees.

This is s. 324 of the Indian Succession Act. See *ante*, p. 384.

144. The refunding shall in all cases be without interest.

This is s. 325 of the Indian Succession Act. See *ante*, p. 384.

145. The surplus or residue of the deceased's property after payment of debts and legacies, shall be paid to the residuary legatee when any has been appointed by the will.

This is s. 326 of the Indian Succession Act. See *ante*, p. 386.

CHAPTER XIII.

OF THE LIABILITY OF AN EXECUTOR OF ADMINISTRATOR FOR DEVASTATION.

146. When an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned.

Illustrations.

(*a.*) The executor pays out of the estate an unfounded claim. He is liable to make good the loss caused by the payment.

(*b.*) The deceased had a valuable lease renewable by notice, which the executor neglects to give at the proper time. The executor is liable to make good the loss caused by the neglect.

(*c.*) The deceased had a lease of less value than the rent payable for it, but terminable on notice at a particular time. The executor neglects to give the notice. He is liable to make good the loss.

This is s. 327 of the Indian Succession Act. See *ante*, p. 388.

147. When an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount.

Illustrations.

(*a.*) The executor absolutely released a debt due to the deceased from a solvent person, or compounds with a debtor who is able to pay in full. The executor is liable to make good the amount so lost.

(*b.*) The executor neglects to sue for a debt till the debtor is liable to plead the Act for limitation of suits, and the debt is thereby lost to the estate. The executor is liable to make good the amount of the debt.

This is s. 328 of the Indian Succession Act. See *ante*, pp. 374, 388.

CHAPTER XIV.

MISCELLANEOUS.

148. In Chapters VIII, IX, X, and XII of this Act the provisions as to an executor shall apply also to an administrator with the will annexed

149. Nothing herein contained shall—

(*a*) validate any testamentary disposition which would otherwise have been invalid;

(*b*) invalidate any such disposition which would otherwise have been valid;

(*c*) deprive any person of any right of maintenance to which he would otherwise have been entitled; or

(*d*) affect the rights, duties, and privileges of the Administrator-General of Bengal, Madras or Bombay.

Compare s. 3 of the Hindu Wills Act. See *ante*, p. 41.

150. No proceedings to obtain probate of a will or letters of administration to the estate of any Hindu, Muhammadan, Buddhist or person exempted under section 332 of the Indian Succession Act, 1865, shall be instituted in any Court in British India except under this Act.

151. [Repealed—Act VII of 1889, Sched. I.]

152. The grant of probate or letters of administration under this Act in respect of any property shall be deemed to supersede any certificate previously granted in respect of the same property under the said Act No. XXVII of 1860, or Bombay Regulation No. VII of 1827; and when, at the time of the grant of such probate or letters, any suit or other proceeding instituted by the holder of such certificate regarding such property is pending, the person to whom such grant is made shall, on applying to the Court in which such suit or proceeding is pending, be entitled to take the place of such holder in such suit or proceeding:

Provided that, when any certificate is superseded under this section, all payments made to the holder of such certificate in ignorance of such supersession shall be held good against claims under the probate or letters of administration.

153. [Repealed—Act VII of 1889, Sched. I.]

154. The following amendments shall be made in the Hindu Wills Act, 1870, n(amely):—

(*a*) For the portion of section two commencing with the words "sections one hundred and seventy-nine," and ending with the words "administrator with the will annexed," the words "and section one hundred and eighty-seven" shall be substituted.

(*b.*) The third clause of section three and the last clause of section six shall be repealed.

(*c.*) In section six, for the words "one hundred and three and one hundred and eighty-two" the words "and one hundred and three" shall be substituted.

See p. 370.

155. All grants of probate of the will or letters of administration to the estate of any deceased Hindu, Muhammadan or Buddhist, or any person exempted under section 332 of the Indian Succession Act, 1865, which, before this Act comes into force, have been made in British Burma, shall, whenever such grant would have been lawful if this Act had been in force, be deemed to have been made in accordance with law.

See pp. 15, 35.

156. In the second schedule to the Indian Limitation Act, 1877, No. 43, after the figures "321" the following shall be inserted, namely—"or under the Probate and Administration Act, 1881, section 139 or 140."

157. (1) When a grant of probate or letters of administration is revoked or annulled under this Act, the person to whom the grant was made shall forthwith deliver up the probate or letters to the Court which made the grant.

(2) If such person wilfully and without sufficient cause omits so to deliver up the probate letters, he shall be punished with fine which may extend to one thousand rupees, or with imprisonment which may extend to three months, or with both.

This section has been added by s. 17 of Act VI of 1889. It corresponds with s. 333 which was added by the said Act to the Indian Succession Act. See p. 361.

ACT VI OF 1889.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General on the 8th March, 1889.)

An Act to amend the Indian Succession Act, 1865, the Probate and Administration Act, 1881, the Court-fees Act, 1870, and the Indian Stamp Act, 1879, and to make provision with respect to certain other matters

WHEREAS it it expedient to amend the Indian Succession Act, 1865, the Probate and Administration Act, 1881, the Court-fees Act, 1870, and the Indian Stamp Act, 1879, and to make provision with respect to certain other matters ; It is hereby enacted as follows :—

1. (1) This Act may be called the Probate and Administration Act, 1889.

(2) It applies to the whole of British India (inclusive of Upper Burma except the Shan States) ; and

(3) It shall come into force at once.

Indian Succession Act, 1865.

2. After the 4th clause of the *explanation* to section 234 of the Indian Succession Act, 1865, the following shall be added, namely :—

"5th, that the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Part XXXIV of this Act or has exhibited under that Part an inventory or account which is untrue in a material respect."

3. In section 244 of the same Act, for the words "and that the petitioner is the executor there named" the following shall be substituted, namely :—

"the amount of assets which are likely to come to the petitioner's hands, and

"that the petitioner is the executor named in the will ;".

4. For the last forty-two words of section 254 of the same Act the following shall be substituted, namely :—

"he having undertaken to administer the same, and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may from time to time appoint, and also to render to this Court a true account of the said property and credits within one year from the same date or within such further time as the Court may from time to time appoint."

5. For the last forty-five words of section 255 of the same Act the following shall be substituted, namely :—

"he having undertaken to administer the same, and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may from time to time appoint, and also to render to this Court a true account of the said property and credits within one year from the same date or within such further time as the Court may from time to time appoint."

6. In section 256 of the same Act, for the words "Every person to whom any grant of administration shall be committed" the words "Every person to whom any grant of letters of administration is committed" shall be substituted.

7. For section 277 of the same Act the following shall be substituted, namely :—

"277. (1) An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the Court which granted the probate or letters may from time to time appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character, and shall in like manner, within one year from the grant or within such further time as the said Court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of.

"(2) The High Court may from time to time prescribe the form in which an inventory or account under this section is to be exhibited.

"(3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under section 176 of the Indian Penal Code.

"(4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under section 193 of that Code."

8. In section 277A of the same Act, for the words "it is sought to obtain a grant" the words "a grant has been made," and for the words and figures "the person applying for administration after the first day of April, 1875," the word "administrator" "shall be substituted,

9. (1) In section 283 of the same Act, for the words "the country in which he was domiciled" the words "British India" shall be substituted.

(2) The *illustration* to the same section is hereby repealed.

10. To the same Act the following shall be added, namely:—

"333. (1) When a grant of probate or letters of administration is revoked or annulled under this Act, the person to whom the grant was made shall forthwith deliver up the probate or letters to the Court which made the grant.

"(2) If such person wilfully and without reasonable cause omits so to deliver up the probate or letters, he shall be punished with fine which may extend to one thousand rupees, or with imprisonment of either description for a term which may extend to three months, or with both."

Probate and Administration Act, 1881.

11. After the 4th clause of the *explanation* to section 50 of the Probate and Administration Act, 1881, the following shall be added, namely:—

"5th, that the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Act, or has exhibited under that Chapter an inventory or account which is untrue in a material respect."

12. For the portion of section 76 of the same Act beginning with the words "he having undertaken to administer the same" and ending with the words "within one year from the same date" the following shall be substituted, namely:—

"he having undertaken to administer the same and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may from time to time appoint, and also to render to this Court a true account of the said property and credits within one year from the same date or within such further time as the Court may from time to time appoint."

13. For the portion of section 77 of the same Act beginning with the words "he having undertaken to administer the same" and ending with the words "within one year from the the same date" the following shall be substituted, namely:—

"he having undertaken to administer the same, and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may from time to time appoint, and also to render to this Court a true account of the said property and credits within one year from the same date or within such further time as the Court may from time to time appoint."

14. For section 90 of the same Act the following shall be substituted, namely:—

"90. (1) An executor or administrator has, subject to the provisions of this section, power to dispose, as he thinks fit, of the property for the time being vested in him under section 4.

"(2) The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order.

"(3) An administrator may not, without the previous permission of the Court by which the letters of administration were granted,—

(*a*) mortgage, charge or transfer by sale, gift, exchange or otherwise any immoveable property for the time being vested in him under section 4, or

(*b*) lease any such property for a term exceeding five years.

"(4) A disposal of property by an executor or administrator in contravention of sub-section (2) or sub-section (3), as the case may be, is voidable at the instance of any other person interested in the property.

"(5) Before any probate or letters of administration is or are granted under this Act there shall be endorsed thereon or annexed thereto a copy of sub-sections (1), (2), and (4), or of sub-sections (1), (3) and (4), as the case may be.

"(6) A probate or letters of administration shall not be rendered invalid by reason of the endorsement or annexure required by the last foregoing sub-section not having been made thereon or attached thereto, nor shall the absence of such an endorsement or annexure authorise an executor or administrator to act otherwise than in accordance with the provisions of this section."

15. For section 98 of the same Act the following shall be substituted, namely:—

"98. (1) An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the Court which granted the probate or letters may from time to time appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also

all the debts owing by any person to which the executor or administrator is entitled in that character, and shall in like manner, within one year from the grant or within such further time as the said Court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of.

"(2) The High Court may from time to time prescribe the form in which an inventory or account under this section is to be exhibited.

"(3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under section 176 of the Indian Penal Code.

"(4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under section 193 of that Code."

16. In section 99 of the same Act, for the words "it is sought to obtain a grant" the words "a grant has been made", and for the words "the person applying for administration" the word "administrator", shall be substituted.

17. To the same Act the following shall be added, namely:—

"157. (1) When a grant of probate or letters of administration is revoked or annulled under this Act, the person to whom the grant was made shall forthwith deliver up the probate or letters to the Court which made the grant.

"(2) If such person wilfully and without sufficient cause omits so to deliver up the probate or letters, he shall be punished with fine which may extend to one thousand rupees, or with imprisonment which may extend to three months, or with both."

Court-fees Act, 1870, *and Indian Stamp Act*, 1879.

18. (1) Article 16 (Administration-bond) of the second schedule to the Court-fees Act, 1870, is hereby repealed

(2) In article 6 of the second schedule to the Court-fees Act, 1870, for the words "Bail-bond or other instrument of obligation not otherwise provided for by this Act, when given by the direction of any Court or executive authority" the following words shall be substituted, namely:—

"Bail-bond or other instrument of obligation given in pursuance of an order made by a Court or Magistrate under any section of the Code of Criminal Procedure, 1882, or the Code of Civil Procedure."

(3) In article 2 of the first schedule to the Indian Stamp Act, after the words "Administration-bond" the following shall be added, namely:—

"including a bond given under section 256 of the Indian Succession Act, 1865, section 6 of the Government Savings Banks Act, 1873, section 78 of the Probate and Administration Act, 1881, or section 9 or section 10 of the Succession Certificate Act, 1889."

(4) In article 13 of the first schedule to the Indian Stamp Act, 1879, after the words "not otherwise provided for by this Act" there shall be added the words "or by the Court-fees Act, 1870."

Miscellaneous.

19. Notwithstanding anything in section 90 of the Probate and Administration Act, 1881, a disposal of property by an executor or administrator who was appointed before the commencement of this Act, and to whom the provisions of that section were applicable, shall not be void by reason only that the consent of the Court to the disposal of the property was not obtained.

20. (1) Any penalty or forfeiture under section 19G or section 19H of the Court-fees Act, 1870, may, on the certificate of the Chief Controlling Revenue-authority, be recovered from the executor or administrator as if it were an arrear of land-revenue by any Collector in any part of British India.

(2) The Chief Controlling Revenue-authority may remit the whole or any such penalty or forfeiture, or any further penalty payable under section 19E of the said Act.

21. The following portion of section 7, clause 3 of the Act of the Lieutenant-Governor of Bengal in Council, No. VII of 1883, entitled the Public Demands Recovery Act, 1880, namely:—

"or in the following sections and portions of the following Act passed by the Governor-General in Council, that is to say, in Act VII of 1870, 'the Court-fees Act,' sections 19G, 19H," is hereby repealed.

THE SUCCESSION CERTIFICATE ACT, 1889.

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THE FIRST SCHEDULE.—ENACTMENTS REPEALED.
THE SECOND SCHEDULE.—FORMS OF CERTIFICATE AND EXTENDED CERTIFICATE.

ACT NO. VII OF 1889.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor-General on the 8th March*, 1889.)

An Act to facilitate the collection of debts on successions and afford protection to parties paying debts to the representatives of deceased persons.

Whereas it is expedient to facilitate the collection of debts on successions and afford protection to parties paying debts to the representatives of deceased persons; It is hereby enacted as follows:—

1. (1) This Act may be called the Succession Certificate Act, 1889.

(2) It shall come into force on the first day of May, 1889; and

(3) It extends to the whole of British India (inclusive of Upper Burma except the Shan States);

(4) But a certificate shall not be granted thereunder with respect to any debt or security to which a right can be established by probate or letters of administration under the Indian Succession Act, 1865, or by probate of a will to which Hindu Wills Act, 1870, applies, or by letters of administration with a copy of such a will annexed.

2. (1) The enactments specified in the first schedule are repealed to the extent mentioned in the third column thereof.

(2) But nothing in this Act shall affect any certificate granted before the commencement of this Act under Act XXVII of 1860 or any enactment repealed by that Act.

(3) Any enactment except this Act and section 152 of the Probate and Administration Act, 1881, or any document, referring to any enactment repealed by this Act or to the corresponding portion thereof.

3. In this Act, unless there is something repugnant in the subject or context,—

(1) "District Court," subject to the other provisions of this Act and to the provisions of proviso (b) to section 23 of the Punjab Courts Act, 1884, and of any other like enactment for the time being in force, means a Court presided over by a District Judge: and

(2) "security" means—

(a) any promissory note, debenture, stock or other security of the Government of India;

(b) any bond, debenture or annuity charged by the Imperial Parliament on the revenues of India;

(c) any stock or debenture of, or share in, a company or other incorporated institution;

(d) any debenture or other security for money issued by, or on behalf of, a local authority;

(e) any other security which the Governor-General in Council may, by notification in the Gazette of India, declare to be a security for the purposes of this Act.

4. (1) No Court shall—

(a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof, or

(b) proceed, upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt,

except on the production, by the person so claiming, of—

(i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or

(ii) a certificate granted under section 36 or section 37 of the Administrator General's Act, 1874, and having the debt mentioned therein, or

(iii) a certificate granted under this Act and having the debt specified therein, or

(iv) a certificate granted under Act XXVII of 1860 or an enactment repealed by that Act, or

(v) a certificate granted under the Regulation of the Bombay Code No. VIII of 1827 and, if granted after the commencement of this Act, having the debt specified therein.

(2) The word "debt" in sub-section (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.

5. The District Court within the jurisdiction of which the deceased ordinarily resided at the time of his death, or if at that time he had no fixed place of residence then within the jurisdiction of which any part of the property of the deceased may be found, may grant a certificate under this Act.

6. (1) Application for such a certificate must be made to the District Court by a petition signed and verified by or on behalf of the applicant in the manner prescribed by the Code of Civil Procedure for the signing and verification of a plaint by or on behalf of a plaintiff, and setting forth the following particulars, namely:—

(a) the time of the death of the deceased;

(b) the ordinary residence of the deceased at the time of his death and, if such residence was not within the local limits of the jurisdiction of the Court to which the application is made, then the property of the deceased within those limits;

(c) the family or other near relatives of the deceased and their respective residences;

(d) the right in which the petitioner claims;

(e) the absence of any impediment under section 1, sub-section (4), or under any other provision of this Act or any other enactment, to the grant of the certificate or to the validity thereof if it were granted; and

(f) the debts and securities in respect of which the certificate is applied for.

(2) If the petition contains any averment which the person verifying it knows or believes to be false, or does not believe to be true, that person shall be subject to punishment according to the provisions of the law for the time being in force for the punishment of giving or fabricating false evidence.

7. (1) If the District Court is satisfied that there is ground for entertaining the application, it shall fix a day for the hearing thereof and cause notice of the application and of the day fixed for the hearing—

(a) to be served on any person to whom, in the opinion of the Court, special notice of the application should be given, and

(b) to be posted on some conspicuous part of the court-house and published in such other manner, if any, as the Court, subject to any rules made by the High Court in this behalf, thinks fit,

and upon the day fixed, or as soon thereafter as may be practicable, shall proceed to decide in a summary manner the right to the certificate.

(2) When the Court decides the right thereto to belong to the applicant, it shall make an order for the grant of the certificate to him.

(3) If the Court cannot decide the right to the certificate without determining questions of law or fact which seem to it to be too intricate and difficult for determination in a summary proceeding, it may nevertheless grant a certificate to the applicant if he appears to be the person having *primâ facie* the best title thereto.

(4) When there are more applicants than one for a certificate and it appears to the Court that more than one of such applicants are interested in the estate of the deceased, the Court may, in deciding to whom the certificate is to be granted, have regard to the extent of interest, and the fitness in other respects, of the applicants.

8. When the District Court grants a certificate, it shall therein specify the debts and securities set forth in the application for the certificate and may thereby empower the person to whom the certificate is granted—

(*a*) to receive interest or dividends on, or

(*b*) to negotiate or transfer, or

(*c*) both to receive interest or dividends, on, and to negotiate or transfer,

the securities or any of them.

9. (1) The District Court shall in any case in which it proposes to proceed under section 7, sub-section (3) or sub-section (4), and may, in any other case, require, as a condition precedent to the granting of a certificate, that the person to whom it proposes to make the grant shall give to the Judge of the Court, to enure for the benefit of the Judge for the time being, a bond with one or more surety or sureties, or other sufficient security, for rendering an account of debts and securities received by him and for indemnity of persons who may be entitled to the whole or any part of those debts and securities.

(2) The Court may, on application made by petition and on cause shown to its satisfaction, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise as the Court thinks fit, assign the bond or other security to some proper person, and that person shall thereupon be entitled to sue thereon in his own name as if it had been originally given to him instead of to the Judge of the Court, and recover, as trustee for all persons interested, such amount as may be recoverable thereunder.

10. (1) A District Court may from time to time, on the application of the holder of a certificate under this Act, extend the certificate to any debt or security not originally specified therein, and every such extension shall have the same effect as if the debt or security to which the certificate is extended had been originally specified therein.

(2) Upon the extension of a certificate, powers with respect to the receiving of interest or dividends on, or the negotiation or transfer of, any security to which the certificate has been extended may be conferred, and a bond or further bond or other security for the purposes mentioned in the last foregoing section may be required, in the same manner as upon the original grant of a certificate.

11. Certificates shall be granted and extensions of certificates shall be made, as nearly as circumstances admit, in the forms set forth in the second schedule.

12. Where a District Court has not conferred on the holder of a certificate any power with respect to a security specified in the certificate, or has only empowered him to receive interest or dividends on, or to negotiate or transfer, the security, the Court may, on application made by petition and on cause shown to its satisfaction, amend the certificate by conferring any of the powers mentioned in section 8, or by substituting any one for any other of those powers.

13. (1) For articles 11 and 12 of the first schedule to the Court-fees Act, 1870, the following shall be substituted, namely:—

Number.		Proper fee.
"11. Probate of a will or letters of administration with or without will annexed.	If the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees.	Two per centum on such amount or value: provided that when, after the grant of certificate under the Succession Certificate Act, 1889, or any enactment repealed by that Act, or under the Regulation of the Bombay Code No. VIII of 1827, in respect of any property included in an

Number.		Proper fee.
		estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of the fee paid in respect of the former grant.
"12. Certificate under the Succession Certificate Act, 1889.	In any case	Two per centum on the amount or value of any debt or security specified in the certificate under section 8 of the Act, and three per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act. NOTE.—(1) The amount of a debt is its amount, including interest, on the day on which the inclusion of the debt in the certificate is applied for so far as such amount can be ascertained. (2) Whether or not any power with respect to a security specified in a certificate has been conferred under the Act, and, where such a power has been so conferred, whether the power is for the receiving of interest or dividends on, or for the negotiation or transfer of, the security, or for both purposes, the value of the security is its market-value on the day on which the inclusion of the security in the certificate is applied for, so far as such value can be ascertained.
"12A. Certificate under the Regulation of the Bombay Code No. VIII of 1827.		(1) As regards debts and securities, the same fee as would be payable in respect of a certificate under the Succession Certificate Act, 1889, or in respect of an extension of such a certificate, as the case may be, and (2) as regards other property in respect of which the certificate is granted, two per centum on so much of the amount or value of such property as exceeds one thousand rupees."

(2) In the Court-fees Act, 1870, section 19, clause viii, for the words and figures "and certificate mentioned in the First Schedule to this Act annexed, No 12," the words and figures "and, save as regards debts and securities, a certificate under Bombay Regulation VIII of 1827" shall be substituted.

14. (1) Every application for a certificate or for the extension of a certificate must be accompanied by a deposit of a sum equal to the fee payable under the first schedule to the Court-fees Act, 1870, in respect of the certificate or extension applied for.

(2) If the application is allowed, the sum deposited by the applicant shall be expended,

under the direction of the Court, in the purchase of the stamp to be used for denoting the fee payable as aforesaid.

(3) Any sum received under sub-section (1) and not expended under sub-section (2) shall be refunded to the person who deposited it.

15. A certificate under this Act shall have effect throughout the whole of British India.

16. Subject to the provisions of this Act, the certificate of the District Court shall, with respect to the debts and securities specified therein, be conclusive as against the persons owing such debts or liable on such securities, and shall, notwithstanding any contravention of section 1, sub-section (4), or other defect, afford full indemnity to all such persons as regards all payments made, or dealings had, in good faith in respect of such debts or securities to or with the person to whom the certificate was granted.

17. Where a certificate in the form, as nearly as circumstances admit, of the second schedule has been granted to a resident within a Foreign State by the British representative accredited to the State, or where a certificate so granted has been extended in such form by such representative, the certificate shall, when stamped in accordance with the provisions of the Court-fees Act, 1870, with respect to certificates under this Act, have the same effect in British India as a certificate granted or extended under this Act.

18. A certificate granted under this Act may be revoked for any of the following causes, namely:—

(*a*) that the proceedings to obtain the certificate were defective in substance;

(*b*) that the certificate was obtained fraudulently by the making of a false suggestion, or by the concealment from the Court of something material to the case;

(*c*) that the certificate was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant the thereof, though such allegation was made in ignorance or inadvertently;

(*d*) that the certificate has become useless and inoperative through circumstances;

(*e*) that a decree or order made by a competent Court in a suit or other proceeding with respect to effects comprising debts or securities specified in the certificate renders it proper that the certificate should be revoked.

19. (1) Subject to the other provisions of this Act, an appeal shall lie to the High Court from an order of a District Court granting, refusing or revoking a certificate under this Act, and the High Court may, if it thinks fit, by its order on the appeal, declare the person to whom the certificate should be granted and direct the District Court, on application being made therefor, to grant it accordingly in supersession of the certificate, if any, already granted.

(2) An appeal under sub-section (1) must be preferred within the time allowed for an appeal under the Code of Civil Procedure.

(3) Subject to the provisions of sub-section (1) and of Chapters XLVI and XLVII of the Code of Civil Procedure as applied by section 647 of that Code, an order of a District Court under this Act shall be final.

20. Save as provided by this Act, a certificate granted thereunder in respect of any of the effects of a deceased person shall be invalid if there has been a previous grant of such a certificate or of probate or letters of administration in respect of the estate of the deceased person and if such previous grant is in force.

21. (1) A grant of probate or letters of administration under the Probate and Administration Act, 1881, in respect of an estate shall be deemed to supersede any certificate previously granted under this Act in respect of any debts or securities included in the estate.

(2) When at the time of the grant of the probate or letters any suit or other proceeding instituted by the holder of the certificate regarding any such debt or security is pending, the person to whom the grant is made shall, on applying to the Court in which the suit or proceeding is pending, be entitled to take the place of the holder of the certificate in the suit or proceeding.

22. Where a certificate under this Act has been superseded or is invalid by reason of the certificate having been revoked under section 18, or by reason of the grant of a certificate to a person named in an appellate order under section 19, or by reason of a certificate having been previously granted, or by reason of a grant of probate or letters of administration, or for any other cause, all payments made, or dealings had, as regards debts and securities specified in the superseded or invalid certificate, to or with the holder of that certificate in ignorance of its supersession or invalidity, shall be held good against claims under any other certificate or under the probate or letters of administration.

23. (1) Where a certificate has been granted under this Act or Act XXVII of 1860, or a grant of probate or letters of administration has been made, a curator appointed under Act XIX of 1841 shall not exercise any authority lawfully belonging to the holder of the certificate or to the executor or administrator.

(2) But persons who have paid debts or rents to a curator authorised by a Court to

receive them shall be indemnified, and the curator shall be responsible for the payment thereof to the person who has obtained the certificate, probate or letters of administration, as the case may be.

24. Any probate or letters of administration, granted before the first day of April, 1881, by any Supreme or High Court of Judicature, or by the Court of a Recorder in Burma, in any case in which the deceased person was not a British subject within the meaning of that expression as used in the charters of the Supreme Courts of Judicature, and in which any assets belonging to him were at the time of his death within the local limits of the jurisdiction of the Court shall, for the purpose of the recovery of debts, the protection of persons paying debts, and the negotiation or transfer of securities included in the estate of the deceased, be deemed to have and to have had the effect which a grant of probate or letters of administration has under the Indian Succession Act, 1865:

Provided that nothing in this section shall be construed to validate any disposal of property by an executor or administrator which has before the commencement of this Act been declared by any competent Court to be invalid.

25. No decision under this Act upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties, and nothing in this Act shall be construed to affect the liability of any person who may receive the whole or any part of any debt or security, or any interest or dividend on any security, to account therefor to the person lawfully entitled thereto.

26. (1) The Local Government may, by notification in the official Gazette, invest any Court inferior in grade to a District Court with the functions of a District Court under this Act, and may cancel or vary any such notification.

(2) Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Court in the exercise of all the powers conferred by this Act upon the District Court, and the provisions of the Act relating to the District Court shall apply to such an inferior Court as if it were a District Court:

Provided that an appeal from any such order of an inferior Court as is mentioned in sub-section (1) of section 19 shall lie to the District Court, and not to the High Court, and that the District Court may, if it thinks fit, by its order on the appeal, make any such declaration and direction as that sub-section authorises the High Court to make by its order on an appeal from an order of a District Court.

(3) An order of a District Court on an appeal from an order of an inferior Court under the last foregoing sub-section shall, subject to the provisions of Chapters XLVI and XLVII of the Code of Civil Procedure as applied by section 647 of that Code, be final.

(4) The District Court may withdraw any proceedings under this Act from an inferior Court and may either itself dispose of them or transfer them to another such Court established within the local limits of the jurisdiction of the District Court and having authority to dispose of the proceedings.

(5) A notification under sub-section (1) may specify any inferior Court specially or any class of such Courts in any local area.

(6) Any Civil Court which for any of the purposes of any enactment is subordinate to, or subject to the control of, a District Court shall for the purposes of this section be deemed to be a Court inferior in grade to a District Court.

27. (1) When a certificate under this Act has been superseded or is invalid from any of the causes mentioned in section 22, the holder thereof shall, on the requisition of the Court which granted it, deliver it up to that Court.

(2) If he wilfully and without reasonable cause omits so to deliver it up, he shall be punished with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to three months, or with both.

28. Notwithstanding anything in the Regulation of the Bombay Code No. VIII of 1827, the provisions of section 3, section 6, sub-section (1), clause (*f*), and sections 8, 9, 10, 11, 12, 14, 16, 18, 19, 25, 26 and 27 of this Act with respect to certificates under this Act and applications therefor, and of section 98 of the Probate and Administration Act, 1881, with respect to the exhibition of inventories and accounts by executors and administrators, shall, so far as they can be made applicable, apply, respectively, to certificates granted under that Regulation, and applications made for certificates thereunder, after, the commencement of this Act, and to the exhibition of inventories and accounts by the holders of such certificates so granted.

LIBRARY

THE FIRST SCHEDULE.

ENACTMENTS REPEALED.

(*See section* 2.

Number and year.	Subject or title.	Extent of repeal.
	Acts of the Governor General in Council.	
XXVII of 1860 ...	Collection of debts on successions.	So much as has not been repealed.
XIV of 1869 ...	Bombay Civil Courts Act, 1869.	In section 16, from and inclusive of the words and figures "Bombay Regulation VIII of 1827" down to and inclusive of the words "representative of deceased persons) and."
XV of 1874 ...	Laws Local Extent Act, 1874.	So much as relates to Act XXVII of 1860.
XIII of 1879 ...	Oudh Civil Courts Act, 1879.	Section 25, clause 3, relating to applications for certificates under Act XXVII of 1860.
V of 1881 ...	Probate and Administration Act, 1881.	Sections 151 and 153.
XVIII of 1884 ...	Punjab Courts Act, 1884.	Section 29, sub-section (1), clause (*a*.)
XII of 1887 ...	Bengal, North-Western Provinces and Assam Civil Courts Act, 1887.	Section 23, sub-section (2). clause (*c*.)
	Act of the Lieutenant-General of Bengal in Council.	
VII of 1880 ...	Public Demands' Recovery Act, 1880.	In section 7, clause (3), the words "and the note to paragraph 12 of Schedule I"

THE SECOND SCHEDULE.

FORMS OF CERTIFICATE AND EXTENDED CERTIFICATE.

(*See section* 11.)

In the Court of

To *A. B.*

Whereas you applied on the day of for a certificate under the Succession Certificate Act, 1889, in respect of the following debts and securities, namely :—

Debts.

Serial number.	Name of debtor.	Amount of debt, including interest, on date of application for certificate.	Description and date of instrument, if any, by which the debt is secured.

Securities.

Serial number.	Description.			Market-value of security on date of application for certificate.
	Distinguishing number or letter of security.	Name, title or class of security.	Amount or par value of security.	

This certificate is accordingly granted to you and empowers you to collect those debts [*and*] [*to receive*] [*interest*] [*dividends*] [*on*] [*to negotiate*] [*to transfer*] [*those securities*].

Dated this day of

District Judge.

In the Court of

On the application of *A. B.* made to me on the day of , I hereby extend this certificate to the following debts and securities, namely :—

Debts.

Serial number.	Name of debtor.	Amount of debt, including interest, on date of application for extension.	Description and date of instrument, if any, by which the debt is secured.

Securities.

Serial number.	Description.			Market-value of security on date of application for extension.
	Distinguishing number or letter of security.	Name, title or class of security.	Amount or par value of security.	

This extension empowers *A. B.* to collect those debts [*and*] [*to receive*] [*interest*] [*dividends*] [*on*] [*to negotiate*] [*to transfer*] [*those securities*].

Dated this day of

District Judge.

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